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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CAROL WEAVER, VICKI HAHN,
SHARRON L. CARROLL, ANGELA SEGRIST,
LOIS KUPFERBERG, and ALICE TENNENBAUM,
Petitioners,

v.

JOSEPH L. STEGER, President, and JILL PARRIS,
Interim Vice-President for Human Resources and
Human Relations, University of Cincinnati; and
DISTRICT 925, SEIU, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 1992

QUESTIONS PRESENTED

I. May a court presume that plaintiffs seeking all available relief, including punitive damages, for violations of their constitutional rights and those of a class have conflicts with class members whom the court speculates may not want violations of their rights remedied, and deny class certification?

II. Does a public employer satisfy its compelling state interest in labor peace by the "least restrictive means" when—in enforcing an "agency shop" scheme—it automatically seizes monies for a union's political, ideological, and other nonbargaining activities from nonunion public employees who have not authorized any deduction of monies to support any union activities, thereby favoring and assisting those union activities?

III. Do the First and Fourteenth Amendments permit a union to retain agency fees seized from nonmembers when it has never fully complied with "the constitutional requirements for the ... **collection** of agency fees" set forth in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986) (emphasis added)?

IV. Does Article III permit a court to refuse to adjudicate damages, and refuse to award at least nominal damages, when it has found First-Amendment procedural due process and civil rights violations?

PARTIES TO THE PROCEEDINGS BELOW

There was one party to the proceeding in the court whose judgment is sought to be reviewed other than the parties named in the caption. The University of Cincinnati was joined as a party Defendant, and was dismissed by the district court as immune under the Eleventh Amendment. *Weaver v. University of Cincinnati*, 758 F. Supp. 446, 450 (S.D. Ohio 1991). Petitioners did not appeal from that decision.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-____

CAROL WEAVER *et al.*,

Petitioners,

v.

JOSEPH L. STEGER *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Carol Weaver, Vicki Hahn, Sharron L. Carroll, Angela Segrist, Lois Kupferberg, and Alice Tennenbaum respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on 23 July 1992.

OPINIONS BELOW

The court of appeals' opinion (Appendix ("App.") A, *infra*, 1a) is reported at 970 F.2d 1523. The unreported judgment of the United States District Court for the Southern District of Ohio appears in App. B, 31a. Its final order and opinion (App. C, 32a) is reported at 764 F. Supp. 1241. Its unreported order conditionally denying class certification appears in App. D, 45a. The court

of appeals' opinion reversing the district court's denial of Petitioners' Motion for a Preliminary Injunction (App. E, 47a) is reported at 942 F.2d 1039.

JURISDICTION

The court of appeals entered judgment on 23 July 1992. On 2 October 1992, Justice John Paul Stevens extended the time to file a petition for a writ of certiorari to and including Monday, 21 December 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article III of the United States Constitution, the First and Fourteenth Amendments to the Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, Rule 23 of the Federal Rules of Civil Procedure, and Ohio's Public Employee Collective Bargaining Law ("PECBL"), Ohio Rev. Code § 4117.09, appear in App. F, 63a.

STATEMENT OF THE CASE

Petitioners are six of approximately 1,200 clerical employees of the University of Cincinnati ("UC") in a bargaining unit whose exclusive bargaining representative is District 925, Service Employees International Union, AFL-CIO ("District 925"). Petitioners are not union members. App. A at 2a-6a.

Pursuant to the PECBL, District 925 and UC executed a collective bargaining agreement—including an agency shop clause—effective June 1990. UC agreed to seize and forward to District 925 "agency fees" equal to full union dues from Petitioners and 402 other employees who refrained from membership in and financial support of the union. App. A at 3a.

On 3 May 1990, District 925 sent a notice of the impending seizures to all nonunion employees, stating that: (i) 10% of District

925's expenditures were for political, ideological, and other nonbargaining activities, and the remaining 90% of union dues (1.2% of an employee's gross monthly salary) was spent for chargeable activities; and (ii) "even if you do not wish to join the Union, you are nonetheless required to pay an agency service fee equal to dues unless you dissent." The nonmember's "wish" to pay a "fee equal to dues" was presumed unless she informed the union--*via* certified mail—that she "dissent[ed]." District Court Record ("R.") 1, Class Action Complaint, Exhibit B.

Some 157 nonmembers—including Petitioners—affirmatively objected to the seizure of full union dues and/or to District 925's calculation of the reduced agency fee. *E.g.*, R. 5, Affidavit of Deborah Schneider, ¶ 12. In June 1990, UC began seizing full union dues from the paychecks of the remaining nonmembers, treating them as though they had offered to contribute the 10% difference between full union dues and the agency fee, and authorized the union to speak on their behalf on political, ideological, and nonbargaining matters.

Petitioners filed this civil rights class action under 42 U.S.C. § 1983 in the district court on 14 August 1990, seeking injunctive relief, nominal, punitive, and compensatory damages, and costs and attorneys' fees, on the ground that Respondents were enforcing their "agency shop" scheme in violation of *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986).[1] Petitioners also challenged the requirement that nonmembers take affirmative action to prevent UC from seizing monies for District 925's political and ideological activities. R. 1, ¶¶ 1, 38; *see also* R. 32, Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment at 28-33.

Simultaneously, Petitioners moved for a class-wide preliminary injunction to stop all fee seizures. R. 2. When the district court denied that motion (R. 8 and R. 9), Petitioners appealed. The court of appeals reversed, and—noting that "the First Amend-

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[1] The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343. R. 1, ¶¶ 2-3.

ment rights of other nonmembers are also abridged"—ordered entry of a preliminary injunction. App. E at 62a. On remand, the district court entered an injunction against future seizures from Petitioners only and an order requiring Respondents to refund to Petitioners only all fees seized prior to entry of the preliminary injunction. R. 61, Order.

While on appeal, Petitioners moved the district court to certify them as representatives of a class of "all employees of [UC] within the relevant bargaining unit: (1) who are represented exclusively for purposes of collective bargaining by Defendant District 925 and (2) who are nonmembers of Defendant District 925, or were nonmembers on 3 May 1990." R. 1, ¶ 12; *see also* R. 18, Motion for Class Certification. The proposed class consisted of 408 nonunion UC employees. App. A at 3a.[2]

The district court denied the motion, conditioning further consideration of certification upon waiver of Petitioners' First Amendment right of privacy of their political, moral and ideological beliefs regarding their "attitudes ... towards [District 925], and their knowledge of activities of [District 925] to which they objected." R. 22, District 925's Motion to Compel Answers at 2; App. D at 45a. In depositions, District 925 asked the Petitioners several personally intrusive questions about their political philosophies and feelings towards unions. R. 22. The district court upheld Petitioners' invocation of their constitutional privilege against answering these questions, but held that the privileged matters were "information ... that will assist the Court in the class] determination." App. D at 46a. Petitioners refused to waive their First Amendment rights. R. 39, Notice to the Court.

While Petitioners pursued this federal-court action, District 925 unilaterally requested that the American Arbitration Association ("AAA") appoint an individual to hear a "challenge" to its

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[2] UC and its officers moved to dismiss on 20 September 1990. R. 15, Motion to Dismiss. The district court dismissed only UC as immune under the Eleventh Amendment. R. 44, Opinion.

calculation of the fee. Petitioners refused to participate in that proceeding, as they were seeking relief in the district court. R. 34, District 925's Motion for Summary Judgment, Exhibit A at 14-16. When the AAA official scheduled a "hearing," Petitioners' counsel informed her that this action had been filed, that hearing prior to compliance with *Hudson*'s notice and financial disclosure requirements was premature, and that Petitioners refused to participate, as they were seeking federal judicial relief.[3] R. 34, Exhibit D. The AAA official proceeded with the "hearing" anyway. *Id.*, Exhibit A at 15-16. And her decision misrepresented that Petitioners' counsel appeared as representatives "For Non-Union Members/Challengers." *Id.* at 1; *see also id.*, Exhibit D (letter from Petitioners' counsel).

On 31 May 1991, the district court entered its Final Order and Judgment, finding that neither of District 925's two notices the court reviewed complied with the "constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310,[4] but largely denying the relief Petitioners requested, including complete restitution of the fees seized from the nonmembers under the

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[3] The court of appeals states that "**Some** of the challenging nonunion employees refused to recognize the arbitrator's authority and requested a postponement of arbitration proceedings until the district court action was concluded." App. A at 5a (emphasis added). The record shows that this is factually wrong as, save for Petitioners' counsel, no "challenger" or representative communicated with the AAA official. Only District 925 sought or participated in the AAA official's "hearing." R. 34, Exhibit A at 14-16.

[4] The district court held that District 925's initial procedures were constitutionally deficient, because the requirement that objections be sent by certified mail "serves no legitimate purpose and works to complicate and frustrate an employee's attempt to raise an objection." App. C at 38a. The court also held that the financial disclosure in District 925's two notices was inadequate, because, *inter alia*, the union did not provide audited financial disclosure for the local and its affiliates receiving a portion of the fee. App. C at 38a-39a. Nevertheless, the court denied relief on the ground that the second notice—sent five months after seizures were initiated and after the AAA proceeding was held, and remedying some, but not all, of the disclosure deficiencies in the union's first notice— "affords plaintiffs the relief they request." App. C at 38a.

defective notices and procedures, and/or nominal damages. App. C, *infra*.[5] Finally, the district court denied Petitioners' claim that the seizure of fees equal to full union dues from nonmembers who had not consented to payment of an amount greater than the mandatory agency fee was impermissible. App. C at 40a n.3.

Petitioners timely noticed their appeal of the judgment on 4 June 1991. R. 47, Notice of Appeal. In the court of appeals, Petitioners raised, *inter alia*: (1) the district court's denial of class certification, App. A at 10a; (2) the district court's approval of the Respondents' practice of seizing fees equal to full union dues from nonmembers who did not respond to District 925's notice, App. A at 10a; (3) the district court's denial of complete restitution of fees seized notwithstanding the deficiencies in District 925's notice and procedures, App. A at 11a; or, (4) in the alternative, the district court's validation of the results of the union's nonconsensual "arbitration" scheme, by which it refused to adjudicate Petitioners' damages or award nominal damages. App. A at 11a. However, the panel affirmed the district court in all respects. App. A at 30a.

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[5] The court held that:

> An arbitrator's decision on the propriety of the chargeability definitions and calculations may be given deferential treatment by a district court. *See Lowary* [*v. Lexington Local Bd. of Educ.*], 903 F.2d [422,] 433 [(6th Cir. 1991)]. Absent a clear chargeability violation overlooked by an arbitrator, a district court and all parties involved would gain little by a full blown evidentiary hearing on this issue. In the present action, the arbitrator thoroughly examined the extensive financial documentation buttressing the calculations and accepted District 925's chargeability determination.

App. C at 40a. In fact, the district court **did not** examine any "financial documentation buttressing the [union's] calculations" of the fee, as it had no record of the "arbitration." R. 34, Exhibits A (decision) and E (excerpt of pages 56-78 of testimony at hearing). Neither did the court examine the AAA official's legal determinations of chargeability.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT FEDERAL QUESTIONS PRESENTED HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

Because the mere existence of an "agency shop" "is 'a significant impingement on First Amendment rights' " of nonunion employees, *Hudson*, 475 U.S. at 301 & n.8, *quoting Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984), the government may not compel public employees to financially support a union's political and ideological activities. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977); *Lehnert v. Ferris Faculty Ass'n*, ___ U.S. ___, ___, 111 S. Ct. 1950, 1959-65 (1991).

Twice in its last three Terms, this Court has reaffirmed the constitutional limitations upon a government which—by virtue of an identified compelling state interest—sanctions private organizations to compel financial support for some of their activities. *See Lehnert* (public-employee unions); *see also Keller v. State Bar*, 496 U.S. 1, 9-17 (1990) ("integrated" or "unified" state bars). This Court has held that requiring the payment or seizure of monies to finance political and ideological activities outside of the compelling state interest justifying the infringement inherent in the compelled association impermissibly violates the First Amendment rights of free association and speech.

This Court has also addressed the constitutional limits on the power of governments and unions under an "agency shop" in *Ellis* (applying to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*), *Hudson* and *Abood* (applying to state and municipal employment). "[T]he importance of these issues" caused the Court to grant certiorari in these cases. *See Lehnert*, 111 S. Ct. at 1956; *Hudson*, 475 U.S. at 294, 300; *cf. Rutan v. Republican Party*, 497 U.S. 62 (1990) (addressing other aspects of free speech rights of public employees); *City of Madison, Joint Sch. Dist. #8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (same); *Elrod v. Burns*, 427 U.S. 347 (1976) (same).

Thus, aside from the 402 other nonunion UC employees whom Petitioners seek to represent,[6] these are critical questions due to the millions of employees whose First-Amendment freedoms are burdened by compulsory unionism schemes.[7]

The freedoms guaranteed by the First Amendment are "rights which we value most highly and which are essential to the workings of a free society," *Speiser v. Randall*, 357 U.S. 513, 521 (1958), in which the government must "tread[ ] with sensitivity." *Hudson*, 475 U.S. at 303 n.12.

Notwithstanding these admonitions, the courts below failed to

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[6] *See also Reese v. City of Columbus*, 798 F. Supp. 463, 472 (S.D. Ohio 1992) (class-wide preliminary injunctive relief granted prior to certification); *Mitchell v. Los Angeles Unified Sch. Dist.* ("LAUSD"), 744 F. Supp. 938, 944 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258, 262 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 375 (1992) (class of 8,000 nonunion teachers); *Hohe v. Casey*, 128 F.R.D. 68, 72 (M.D. Pa. 1989) (class of 18,000 nonunion state employees); *Damiano v. Matish*, 644 F. Supp. 1058, 1060 (W.D. Mich. 1986) (class of 200 state employees), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987).

Of course, the Court's disposition of this question would also be precedential in other "agency shop" contexts, including those under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and those arising under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*; *Keller*, 496 U.S. at 14-17; *see also Lehnert*, 111 S. Ct. at 1956-59; *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988); *Ellis*, 466 U.S. at 443, 455-56.

[7] As of 1990, some form of compulsory unionism was authorized for public employees in some twenty-three states and the District of Columbia. Pub. Employee Bargaining (CCH) ¶ 5500 (1990). Approximately 2.2 million nonmember employees represented by unions are divided evenly between public and private sectors, *Union Membership Unchanged at 16.1 Percent of Employment in 1991*, Daily Lab. Rep. (BNA) No. 28, at B-1 (11 Feb. 1992). Approximately 80% of the employees falling under the jurisdiction of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, are subject to agency shop arrangements with private employers. Bureau of Lab. Stat., *Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions* at 5 (1982).

tread with the requisite sensitivity on the First-Amendment rights of nonunion UC employees, denying broad and effective restitutionary relief for an entire class of constitutionally-injured public employees. Thus, if the panel's decision stands, unions and public employers will rest secure in the knowledge that failure or refusal to comply with constitutional requirements will be met with nothing more than a judicial slap on the wrist. They will have every incentive to ignore nonmembers' First-Amendment rights, since federal courts will not order unions to disgorge their ill-gotten gains, or worse, will abdicate their Article III duties and validate nonconsensual proceedings invoked at the sole behest of a constitutional tortfeasor.

Likewise, the panel's speculative presumption that some absent class members desire to forego remediation of Respondents' violations of their rights provides a far-reaching, unprincipled method for mass tortfeasors to avoid the consequences of their tortious acts. Denial of class certification based upon mere surmise is contrary to the principles underlying the availability of the class action device. *See, i.e., Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 487 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) ("The very existence of the class procedure suggests a policy in favor of making it available to litigants when possible.").[8]

Finally, the panel's validation of procedures which allow government to compel silent nonmembers to fund the union's

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[8] The denial of class certification based upon a litigant's efforts to obtain all relief available will doubtless chill vigorous and zealous advocacy on behalf of a constitutionally-injured class. *Cf. NAACP v. Button*, 371 U.S. 415, 440 (1963) (enforcement of "**constitutional** rights through litigation, **as a matter of law**, cannot be deemed **malicious**") (emphasis added); *In re Primus*, 436 U.S. 412, 425-28, 432-34, 437-38 (1978); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-23 (1967). The finding of these conflicts will also serve to chill plaintiffs' counsel in their duty of "zealous representation," since the panel's decision virtually instructs attorneys that they must not zealously represent their clients by seeking what a court may consider to be "too much" relief.

nonchargeable activities promotes widespread distortion of political and legislative processes. *Cf. Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (government has primary interest in prevention of corruption and appearance of corruption in electoral process). "Conditioning public employment on partisan support prevents support of competing political interests." *Elrod*, 427 U.S. at 356. "Given the increasingly pervasive character of government employment, ... the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant [distorting] impact on the formation and expression of political beliefs." *Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980).[9] For all of these far-reaching and important reasons, the Petition should be granted.

II. THE COURTS BELOW DENIED CLASS CERTIFICATION BASED UPON SHEER SPECULATION REGARDING CONFLICTS WITH ABSENT CLASS MEMBERS

A. The Conflicts With This Court

Before it would consider Petitioners' motion for class certification, the district court required them to waive their First Amendment privilege, asserted against District 925's inquiries into Petitioners' private moral, political, and philosophical beliefs regarding unions, holding that those responses would provide "information ... that will assist the Court in [its] determination" of whether Petitioners "'will fairly and adequately protect the interests of the class.'" App. D at 45a-46a, *citing* Fed. R. Civ. P. 23(a)(4).

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[9] Applying District 925's concession that 10% of its expenditures are for political, ideological, and other nonbargaining activities to the number of nonmembers covered by agency shop arrangements, and assuming average *per capita* dues among unions of $444.00, James T. Bennett, *Private Sector Unions: The Myth of Decline*, 12 J. Lab. Res. 1, 4 (Winter 1991), the panel's approval of the government-aided union collection system may produce an annual $50 million political and ideological fund seized from nonunion employees who have never agreed to fund such speech, nor authorized any union to speak for them.

The court of appeals affirmed, citing two "factors indicating that various nonmembers have different reasons for refusing to join the union, thus negating commonality of purpose." App. A at 13a. First, the panel assumed that publishers of an anti-union newsletter "want[ ] to weaken and if possible destroy the union," *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989), and therefore "could have interests that conflict with those of other nonunion employees who are merely 'free riders.'" App. A at 13a.[10] Second, the panel suggested that Petitioners' request for an award of punitive damages "is arguably antagonistic to the wishes of other employees. It is entirely possible that those approximately 243 nonunion employees who did not dissent from or challenge the agency shop fee do not wish to have all of their fees returned." App. A at 14a.[11] In short, the court below held that Petitioners' request for relief perforce creates class antagonisms, based upon sheer speculation and the absence of any facts regarding the "wishes" of absent members of the class.[12]

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[10] At least one of the Petitioners was involved in the publication and/or distribution of this document. R. 24, District 925's Opposition to Plaintiffs' Motion for Class Certification, Exhibit A.

[11] The panel agreed with the Seventh Circuit that full restitution of fees seized prior to compliance with the "constitutional requirements," *Hudson*, 475 U.S. at 310, is punitive. App. A at 13a-14a, 20a. While equating full restitution with punitive damages is arguable (it is well-established that punitive damages are available in a suit brought pursuant to 42 U.S.C. § 1983, *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see also Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986) (punitive damages are available; purpose is "to deter others from similar behavior")), Petitioners did seek an award of punitive damages in their Complaint, R. 1, Prayer for Relief, though they did not seek an award of punitive damages *per se* in their Motion for Summary Judgment, or on appeal to the Sixth Circuit.

[12] The panel's suggestion that these employees "do not wish to have all of their fees returned," App. A at 14a, is economically unreasonable upon its face. Even assuming *arguendo* that such individuals exist (no record evidence suggests that they do), the remedies sought by Petitioners would not prevent class members from making voluntary contributions to District 925 in any amount that they were to voluntarily choose.

Class-wide relief is "peculiarly appropriate" where "[t]he issues involved are common to the class as a whole," and "[t]hey turn on questions of law applicable in the same manner to each member of the class," since "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *see also General Telephone Co. v. Falcon*, 457 U.S. 147, 155 (1982). Indeed, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Its efficiency is "a principal purpose of the [class action] procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

This Court has often considered the due process implications of class actions—hence, the requirement that representative parties "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4)—but has never suggested that a litigant's request for **all** available relief, including punitive damages, creates antagonisms sufficient to defeat the class. *Cf. East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 405 (1977) (failure of litigant's counsel to timely move for certification and request for remedy where evidence showed that majority of the class had opted for different goal, bears on adequacy requirement).

The due process questions raised by the class action device are questions of whether the class litigant is engaging in "the fraudulent and collusive sacrifice of the rights of absent parties." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). A litigant's adequacy thus depends upon whether she will provide vigorous representation, not whether she seeks "too much" relief.

Here, the panel's concern was that the class representatives were somehow **too** vigorous in their representation, seeking greater economic relief than—the panel surmised—other members of the class might desire. App. A at 14a. This Court has recently

rejected the notion that a court's "sheer speculation" is an adequate basis for asserting that relief should not be granted. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46 (1990). As the decisions of the courts below rely upon "sheer speculation" as to "the wishes of [other] employees," App. A at 14a, the panel's decision conflicts with this Court's decisions regarding the conflicts cognizable to defeat class representation, and is contrary to this Court's standards regarding the usual and accepted bases for judicial decisionmaking.

B. The Conflicts Among The Courts Of Appeals

Other circuits considering whether a litigant's request for relief creates cognizable class conflicts have rejected the speculative reasoning adopted by the court below. The split in judicial decisionmaking is two-fold.

Many courts have held that, where a litigant seeks to vindicate the statutory or constitutional rights of all similarly-situated individuals, real conflicts or speculation regarding absent class members' desire to forego remediation and vindication of their rights simply cannot defeat class representative status. *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981); *see also Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968) (fact that some class members were personally satisfied with defendant's conduct "is irrelevant") & n.42 (reversing district court's finding— "because the specific relief requested by the plaintiffs was not, in its view, appropriate"—that Rule 23(b)(2) was not satisfied); *Potts v. Flax*, 313 F.2d 284, 288-89 (5th Cir. 1963) (suit "directed at the system-wide policy" was properly a class action); *Halderman v. Pennhurst State Sch. & Hospital*, 612 F.2d 84, 109-11 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981) (no bar to certification at liability stage though there may be disagreement later as to appropriate relief); *cf. Miles v. Metropolitan Dade County*, 916 F.2d 1528, 1534 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 273 (1991) (party opposing class showed no evidence that some members of the class opposed the action). Indeed, at least two circuits have held that—where constitutional rights are at issue—even near-certainty that some

members of the class are perfectly happy to have their rights violated does not constitute a cognizable conflict sufficient to deny certification. *Galda v. Bloustein*, 686 F.2d 159, 163 n.8, 169 n.19 (3d Cir. 1982), *cert. denied*, 475 U.S. 1065 (1986) (suggesting reconsideration of denial of class certification, despite evidence that 25% of the proposed class supported program); *Horton*, 690 F.2d at 488 (directing certification in challenge to canine "sniff searches" in a high school).[13]

However, two circuits—now joined by the Sixth—have held that a court may hypothesize about the possibility of conflicts, and assume that such conflicts actually exist to defeat a litigant's ability to represent the class. However, they have applied such a rule only in the limited context of constitutional challenges to agency fee schemes. *Kidwell v. Transp. Communications Int'l Union*, 946 F.2d 283, 305 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1760 (1992); *Gilpin*, 875 F.2d at 1313. As here, both courts assume—without record evidence supporting their suppositions—that conflicts exist in the desires of absent class members.

On the other hand, there are four reported district court decisions certifying the class of "potential objectors" sought here, *Hudson*, 475 U.S. at 306, in cases seeking relief for violations of the standards set forth in this Court's decision in *Hudson*, and another by a district court in the Sixth Circuit granting class-wide preliminary injunctive relief prior to certification in circumstances identical to those herein. *See supra* note 6.

Thus, there is a clear split of authority over whether a court may properly find a litigant inadequate as a class representative where—as here—that litigant seeks all relief available under a statute and the court surmises that some members of the class may not desire all of the relief sought. The Court should grant this Petition to resolve this conflict.

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[13] "[T]he class member who wishes to remain a victim of unlawful conduct does not have a legally cognizable conflict with the class representative." 1 *H. Newberg on Class Actions* § 3.30, at 215 (1985).

III. PERMITTING THE GOVERNMENT TO SEIZE MONIES FOR A PRIVATE ORGANIZATION'S POLITICAL ACTIVITIES CONFLICTS WITH THE "LEAST-RESTRICTIVE MEANS" TEST APPLIED TO INFRINGEMENTS ON FIRST-AMENDMENT RIGHTS

Governmental restrictions on First-Amendment rights must satisfy the Court's "least restrictive means" test—"'if there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Attorney General v. Soto-Lopez*, 476 U.S. 898, 909-10 (1986), *quoting Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960). This Court's decisions do not establish an exception to the rule that the government's "significant impairment of First Amendment rights must survive exacting scrutiny," *Elrod*, 427 U.S. at 362, *citing Buckley*, 424 U.S. at 64-65, and *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958), so long as the infringement benefits a union in an agency shop.

Though the agency shop is "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455; *see also Hudson*, 475 U.S. at 301 n.8 (*citing Ellis*), this impingement may be justified by the State's compelling interest in "labor peace." *Abood*, 431 U.S. at 224; *see generally, Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986) (when statutory provision burdens First Amendment rights, it must be justified by a compelling state interest). However, this interest permits a public employer to impose and enforce an agency shop only "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Abood*, 431 U.S. at 225-26, 237 (agency shop insures "the Union's ability to require every employee to contribute to the cost of collective-bargaining activities"); *see also Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 231, 235 (1956) (assessment of fees limited to "the work of the union in the realm of collective bargaining" is permissible; different question presented for amounts "imposed for

purposes not germane to collective bargaining" (note omitted)). The state's compelling interest is thus completely served when it seizes monies from nonmembers only for the cost of collective bargaining activities.

The government's seizure of monies to finance a union's political and ideological activities from nonunion employees who simply do not respond to a union mailing cannot survive the exacting "least restrictive means" test.[14] *See Soto-Lopez*, 476 U.S. at 909-10. There is no "compelling state interest"—or any state interest at all—served when a public employer facilitates the subsidization of a union's political and ideological activities. *Cf. Galda*, 686 F.2d at 169 (court assumes that "no compelling governmental interest can be shown that justifies the assessment of" a fee for a private organization's political and ideological activities), *further proceedings sub nom. Galda v. Rutgers*, 772 F.2d 1060, 1067 (3d Cir. 1985) (state can prove no compelling interest justifying exactions for political and ideological purposes). Certainly, the panel identified none.[15]

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[14] The court of appeals erroneously states that Petitioners' argument assumes that the union has not provided adequate notice and financial disclosure. App. A at 15a. While the district court found that neither of the union's two notices satisfied all of the requirements of *Hudson*, App. C at 38a-39a, Petitioners' argument does not rely upon failure to comply with *Hudson*. Petitioners' argument is that consent to the government's seizure of monies for political and ideological speech can never be presumed from mere silence, and the solicitor of funds for such speech must obtain affirmative consent before he may lay claim to such funds. "[A]cquiescence," to use the panel's word, App. A at 15a, cannot be sufficient to permit the government to enforce support of a union's political speech.

[15] The only interest identified by the court of appeals is that such a "procedure would greatly burden unions." App. A at 19a. However, this Court long ago recognized that "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362. Seizure of amounts for union political and ideological activities serve only the interests of the union, as well as those beneficiaries of union largesse, such as elected public officials. However, just last Term, this Court held in *R.A.V. v.*

(continued...)

A public employer's seizure—for and on behalf of a labor organization—of an amount exceeding the nonmember's *pro rata* share of the cost of union representation "casts the union in the role of a 'free rider' at the expense of non-union employees." *Mitchell*, 744 F. Supp. at 943. It confers a government-mandated, government-enforced special privilege upon favored speakers in expressing their views on political and ideological subjects, *cf. R.A.V. v. City of St. Paul*, 112 S. Ct. at 2547 (First Amendment does not permit city to impose special restrictions on those speakers who express views on disfavored subjects), and places in the hands of the government—rather than the individual—"the decision as to what views shall be voiced." *Cohen v. California*, 403 U.S. 15, 24 (1971). The government's primary interest in "the prevention of corruption and the appearance of corruption," *Buckley*, 424 U.S. at 25, is not served when it places the burden on the dissenter, rather than upon the solicitor, of the political dollar. *Cf. Federal Election Comm'n v. National Educ. Ass'n*, 457 F. Supp. 1102, 1109 (D.D.C. 1978) (holding that "to ensur[e] that every dollar in that political action fund is knowingly and intentionally given[,] ... **the burden must be on the solicitor and not the dissenter**") (emphasis added), *citing Pipefitters Local 562 v. United States*, 407 U.S. 385, 439 (1972); *see also Lehnert v. Ferris Faculty Ass'n-MEA-NEA*, 707 F. Supp. 1473, 1480 (W.D. Mich. 1988) (constitutional waiver must be voluntary, knowing, and intelligently made to be valid).

Nonetheless, the court of appeals agreed with the Ninth Circuit in *Mitchell*, 963 F.2d at 262, rejecting Petitioners' argument because "it seeks to shift the balance of interests underlying all of the Supreme Court's pronouncements on the subject of agency shop fees." The court rejected Petitioners' argument (that the burden must constitutionally lie with the union) because such

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[15](...continued)
City of St. Paul, ___ U.S. ___, ___, 112 S. Ct. 2538, 2545 (1992), that the First Amendment circumscribes the government's authority to limit speech: "The government may not regulate use based on ... favoritism—towards the underlying message expressed."

a "procedure would greatly burden unions while offering only a modicum of control to nonunion employees." App. A at 19a.

Although the panel does not finish the thought, it was clearly and impermissibly concerned about "burden[ing]" the union **only in collecting funds for its political and ideological activities**, which has nothing to do with satisfying the government's compelling interest in labor peace.[16]

A government which seizes only the reduced fee completely satisfies its compelling interest in labor peace justifying the "agency shop," since those who benefit from the union's representation "pay a fair share of the union's cost of negotiating and administering a collective-bargaining agreement." *Hudson*, 475 U.S. at 301 (footnote omitted). To presume from nothingness—a nonmember's silence—that she supports the union's political and ideological activities, is contrary to this Court's "least restrictive means" test for First Amendment infringements, and insures that nonmembers will be compelled—by reason of their inertia—to financially support the union's political and ideological activities.

This case presents the heretofore unanswered question of whether the silence of a nonmember of a union will be treated the same as the silence of a member—who has affirmatively associated himself with the goals and activities of the union—in an area fraught with the heightened sensitivity of political, ideological, and

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[16] Prohibiting the government from automatically seizing the nonchargeable portion of the union's fee would impose a burden of soliciting funds which is no greater or less than for any other organization engaged in political or ideological activities. Oddly, the panel balks at treating unions like all other voluntary associations, which must solicit donations for their political causes without the aid and coercive force of the government. *Compare R.A.V.*, 112 S. Ct. at 2547 (First Amendment does not permit city to impose special prohibitions on speakers who express views on disfavored subjects); *see also Cohen*, 403 U.S. at 24 ("The constitutional right of free expression is ... intended to remove governmental restraints from the arena of public discussion, **putting the decision as to what views shall be voiced largely into the hands of each of us** ....") (emphasis added).

noncollective bargaining speech.[17] The panel's decision is contrary to this Court's decisions that governments have the obligation to "tread[ ] with sensitivity in areas freighted with First Amendment concerns," *Hudson*, 475 U.S. at 303 n.12, and to refrain from "regulat[ing] use based on ... favoritism—towards the underlying message expressed," *R.A.V.*, 112 S. Ct. at 2545, as UC has been permitted to presume from silence that a nonmember desires to financially support a union's political and ideological activities. The Petition should be granted because the court below failed to apply the accepted and usual analysis to this important First-Amendment question.

Thus, reversal of the panel's decision would not hinder any

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[17] Asserting that "*Abood* adopted ... the Supreme Court's earlier Railway Labor Act cases," App. A at 16a, the panel cites this Court's decisions in *Machinists v. Street*, 367 U.S. 740, 774 (1961), *Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963), and *Hudson*, 475 U.S. at 309, for the proposition that nonunion public employees bear an affirmative burden of "objection" to avoid liability for payment or seizure of fees for the union's political and ideological activities. App. A at 16a.

The panel ignored that the relevant language appears in a **different** context when it is quoted in *Hudson*, 475 U.S. at 306, the first agency shop case dealing exclusively with nonmembers in the public sector, than its original union-member context in *Street*. *Hudson*'s context recasts the meaning of the language.

Hudson stated the specific "constitutional requirements for the Union's collection of agency fees." 475 U.S. at 310. When discussing the burden of "objecting," this Court spoke not in the context of objecting in order to receive the "advance reduction" of the fee required for nonmembers; *id.* at 304-06, but rather, in the context of objecting to invoke the "impartial decisionmaker" process:

> the nonunion employee has the burden of raising an objection, ... the union retains the burden of proof: "'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.'" *Abood*, 431 U.S., at 239-240, n.40, quoting ... *Allen*, 373 U.S. [at] 122 (1963).

Id. at 306 (other citations and footnote omitted).

compelling—or even legitimate—state interest in promoting "labor peace." Rather, labor organizations (like any other speaker in the public political and ideological dialogue) would merely be required to obtain consent prior to speaking on behalf—**and obtaining the financial support**—of others. A contrary ruling allows government "favoritism" for the political and ideological expressions of unions contrary to *R.A.V. v. City of St. Paul*, insofar as the government appoints such private organizations as the political and ideological agent of the silent nonmember, and agrees to become the collection agent for those unions.

IV. THE PANEL'S DENIAL OF COMPLETE RESTITUTION OF ALL SEIZED FEES ENCOURAGES UNIONS AND PUBLIC EMPLOYERS TO IGNORE THE REQUIREMENTS OF *HUDSON* AND CONFLICTS WITH THIS COURT'S STANDARDS FOR THE FORMULATION OF APPROPRIATE REMEDIES

A. The Conflicts With This Court

In *Hudson*, 475 U.S. at 309, this Court held that—before they enforce an agency shop scheme—unions and public employers are required to provide notice and establish procedures to safeguard the right of nonunion employees to refrain from supporting the political, ideological, and other nonbargaining activities of the union. The Court's holding is a model of clarity: "[T]he constitutional requirements for the ... collection of agency fees include ...." *Id.* at 310.

In the Sixth Circuit, courts have consistently held that compliance with *Hudson* is a necessary precondition to **any** agency fee collections, and that nonmembers are entitled to preliminary injunctive relief stopping all seizures upon showing a likelihood of proving noncompliance with *Hudson*. *See, i.e.*, App. E at 62a; *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131, 134-35 (6th Cir. 1988); *Reese*, 798 F. Supp. at 472; *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1335 (W.D. Mich. 1986); *see also Lucid v. City & County of San Francisco*, 774 F. Supp. 1234, 1240 (N.D. Cal. 1991); *Ellis v. Western Airlines*, 652 F. Supp.

938, 939-40 (S.D. Cal. 1986). The panel below reaffirmed this commitment. App. A at 20a.

However, denying full restitution of seized fees, it also reaffirmed its decision in *Lowary*, 903 F.2d at 433: "*Hudson* did not disturb the Supreme Court's earlier decision in *Allen* [373 U.S. at 122] 'that the proper remedy for an unconstitutional fee collection is not a refund of the total fee,' but is the refund of the portion of the exacted fees proportionate to the union's nonchargeable expenditures." App. A at 19a. Of course, **nowhere in its discussion of remedies did this Court discuss or cite *Allen*, relied upon by the courts below to deny complete restitution!**

This Court did, however, advise the district court that the "judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." 475 U.S. at 309 n.22, *citing National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978) (goal is "both to avoid a recurrence of the violation and to eliminate its consequences"), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971).

While holding that the Respondents failed to comply with *Hudson*, the courts below refused to "provide meaningful backward-looking relief," *McKesson*, 496 U.S. at 31, in the form of a complete refund of the Petitioners' property.[18] They negated the **holding** of *Hudson* that the existence of a valid procedure is a precondition to **any** entitlement to monies from the nonmembers, even that portion which allegedly goes to support the union's collective bargaining activities.

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[18] The Respondent's failure to comply with "the constitutional requirements," *Hudson*, 475 U.S. at 310, was not borne of mere indifference to the rights of the nonmembers. To fully navigate their way through the Respondents' first set of procedures, nonmembers were required to make three certified mailings to various union officials, App. E at 37a-38a, and participate in an internal union hearing identical to that specifically condemned by this Court in *Hudson*, 475 U.S. at 308.

A court's discretion in fashioning equitable relief does not permit it to deny **effective** and **meaningful** relief to a litigant. The finding of a constitutional violation:

> impose[s] a duty on the District Court to grant appropriate relief. Our prior decisions counsel that in the event of a constitutional violation "all reasonable methods be available to formulate an effective remedy," and that every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation."

Hills v. Gautreaux, 425 U.S. 284, 297 (1976) (alteration in original; citations omitted) (*quoting North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971), and *Davis v. School Comm'rs*, 402 U.S. 33, 37 (1971)). This duty to provide **effective** relief is "premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context." *Gautreaux*, 425 U.S. at 294 n.11; *see also Spallone v. United States*, 493 U.S. 265, 276 (1990) ("When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers"). The district court's relief must also serve to "avoid a recurrence of the violation." *National Soc'y of Professional Eng'rs*, 435 U.S. at 697; *see also United States v. Paradise*, 480 U.S. 149, 193 n.3 (1987) (Stevens, J., concurring); *Hudson*, 475 U.S. at 309 n.22.

The only remedy which would effectively "avoid recurrences" of Respondents's grossly unconstitutional conduct is the irrevocable return of all fees seized from all class members prior to complete compliance with the "constitutional requirements for the ... collection of agency fees." *Id.* at 310.[19] The lower courts

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[19] While the district court ordered the union to return all seized fees when directed to enter preliminary injunctive relief, the scope of that order was limited to the Petitioners. No relief has been ordered which makes any refund to the absent class members.

declined to order complete restitution because "'[t]o allow plaintiffs to recover for both chargeable and nonchargeable expenditures would constitute a windfall to plaintiffs,'" App. A at 19a-20a, *citing Lowary II*, 903 F.2d at 433, and because refusal to provide such a remedy does "not serve as encouragement to unions to disregard *Hudson*." App. A at 20a. This conclusion ignores *Hudson's express holding that a union has no right* to collect even a cent from nonmembers absent a lawful collection plan and notice, *Hudson*, 475 U.S. at 310, its standards for formulating an appropriate remedy, *id.* at 309 n.22, and simple common sense.

This Court has held that where unconstitutional tax seizures occur, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson*, 496 U.S. at 31 (footnotes omitted). Injured parties must be provided with a "clear and certain remedy." *Id.* at 33. *McKesson* also indicated that the preferred course in cases of unconstitutional seizures is to "erase the property deprivation itself by providing petitioner with a full refund." *Id.* at 39-40. The union must be held to have forfeited its mere **contractual** claim to collect a fee by its failure or refusal to meet the constitutional minimum "requirements for the ... collection of agency fees." *Hudson*, 475 U.S. at 310.

We also note that the Court has recently heard argument in a case in which it appears necessary to more specifically define the contours of "meaningful backward-looking relief to rectify any unconstitutional deprivation," *McKesson*, 496 U.S. at 31, of property. *See Harper v. Virginia Dep't of Taxation*, 61 U.S.L.W. 3379 (U.S. 2 Dec. 1992) (No. 91-794). In light of its probable impact, it may be appropriate for the Court to defer ruling on the instant Petition pending a decision in *Harper*.

B. The Lower Courts Are Divided

The lower courts—even in the Sixth Circuit—have issued conflicting opinions on this question.

Many courts have held that the "effect of the Court's holding

[in *Hudson*] was to disallow the collection of representation fees," where, as here, the notice and procedures are constitutionally defective. *Robinson v. New Jersey*, 806 F.2d 442, 446 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987); *accord Tierney v. City of Toledo*, 824 F.2d 1497, 1504, 1507 (6th Cir. 1987); *Lowary*, 854 F.2d at 134-35; *see also* App. E at 62a (preliminary injunction stopping all fee seizures); *Reese*, 798 F. Supp. at 472 (same); *Lucid*, 774 F. Supp. at 1240 (same); *Ellis*, 652 F. Supp. at 939-40 (same); *Lehnert*, 643 F. Supp. at 1335 (same).[20]

There is a clear split of authority over requiring complete restitution of all agency fees seized in violation of *Hudson*. Some courts have followed the logical implications in *Weaver I* and *Lowary I—see Toledo Fed'n of Teachers v. Gibney*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1989); *Elvin v. Oregon Public Employees Union*, 313 Or. 165 (1992); and *Jordan v. City of Bucyrus*, 739 F. Supp. 1124, 1128 (N.D. Ohio 1990)—and ordered full restitution after final judgments have been entered that unions have failed to comply with *Hudson*; others—*Gilpin*, 875 F.2d at 1316; *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1501-02 (N.D. Cal. 1992); *Hohe v. Casey*, 727 F. Supp. 163, 167-68 (M.D. Pa. 1989), *aff'd*, 956 F.2d 399 (3d Cir. 1992)—have made a contrary determination. The Petition should be granted to resolve this conflict.

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[20] In the Sixth Circuit, conflicts appear in decisions rendered by two panels deciding different appeals in the same cases, including this case. *See Lowary I*, 854 F.2d at 134-35 (enjoining all seizures), and *Lowary II*, 903 F.2d at 433 (refusing to grant complete restitution). Likewise, here, the Sixth Circuit ordered the entry of a preliminary injunction, App. E at 62a, but denied restitution as a matter of retrospective relief, App. A at 20a, affirming the district court's application of *Lowary II*, though the union never complied with *Hudson*, 475 U.S. at 310.

V. THE PANEL'S REFUSAL TO REQUIRE FEDERAL ADJUDICATION OF PETITIONERS' DAMAGES, OR AT LEAST REQUIRE AN AWARD OF NOMINAL DAMAGES, CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHERS, AND IS CONTRARY TO THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

A. The Conflicts With This Court

Assuming *arguendo* that complete restitution is not the required remedy, the courts below abdicated their judicial responsibilities by refusing to adjudicate Petitioners' damages, giving "preclusive effect," *Hudson*, 475 U.S. at 308 n.21, to District 925's nonconsensual proceeding before an AAA official appointed at the union's request. This violates *Hudson*, which specifically held that such a "decision would not receive preclusive effect in any subsequent § 1983 action." *Id.*[21]

This also conflicts with this Court's decisions regarding the responsibilities of federal courts, which prohibit the judiciary's abdication of its Article III duties. The actions of the courts below depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory powers. *See* Sup. Ct. R. 10.

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[21] This conclusion is hardly surprising. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides "a uniquely federal remedy against incursions ... upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239 (1972), since "the central objective of the Reconstruction-Era civil rights statutes ... is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). *See also Felder v. Casey*, 487 U.S. 131, 139 (1988) (same). Thus, this Court has stated—"categorically"—that exhaustion of or mandatory reference to state administrative remedies is not a prerequisite to an action under § 1983. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 501 (1982) ("we have not deviated from that position in the 19 years since *McNeese* [*v. Board of Education*, 373 U.S. 668, 671-73 (1963)]."

The finding of a constitutional violation "impose[s] a duty on the District Court to grant appropriate relief," *Gautreaux*, 425 U.S. at 297 (emphasis added), since Article III, § 1, "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (emphasis added); *see also Peretz v. United States*, ___ U.S. ___, ___, 111 S. Ct. 2661, 2669 (1991) (litigants have "personal right to have an Article III judge preside over a civil trial"); *cf. Farrar v. Hobby*, ___ U.S. ___, No. 91-990, 1992 WL 362775, at *1, *5 (14 Dec. 1992).[22]

Thus, this Court has reversed a decision according preclusive effect to an unappealed arbitration award in a suit subsequently brought pursuant to 42 U.S.C. § 1983. *McDonald v. City of West Branch*, 466 U.S. 284, 285 (1984); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (rejecting judicially-fashioned "rule of preclusion" where true arbitration occurred); and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) (same).[23] The courts below ignored those mandates, according

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[22] The duty to adjudicate and award damages is also imposed by 42 U.S.C. § 1983. This Court has repeatedly, and recently, held that "when a plaintiff establishes the violation of [a plaintiff's] right to procedural due process," a court is "obligate[d]" under 42 U.S.C. § 1983 "to award nominal damages." *Farrar*, 1992 WL 362775, at *5, *citing Carey v. Piphus*, 435 U.S. 247, 266 (1978). Having refused to adjudicate Petitioners' damages or award nominal damages, the courts below departed from the accepted and usual course of judicial proceedings, by failing to apply this Court's well-established standards for the formulation of an appropriate remedy under 42 U.S.C. § 1983. Because this is clear error under *Farrar* and *Carey*, the Court should either grant this Petition, or, at a minimum, vacate and remand for reconsideration on this issue.

[23] Arbitration cannot substitute for a federal court adjudication:

> Because § 1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable. Indeed, as we explained in *Mitchum v. Foster*, 407 U.S. 225, 242 ... (1972), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to

(continued...)

"preclusive effect" to a proceeding which did not even have the virtue of any nonmember's consent to its occurrence.[24]

Likewise, this Court has resolutely protected the integrity of the judicial process: "Article III, § 1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' ... and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Schor*, 478 U.S.

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[23](...continued)
protect the people from unconstitutional action under color of state law." See also *Patsy v. Florida Board of Regents*, 457 U.S. 496 ... (1982). *McDonald*, 466 U.S. at 290. Because of the deficiencies in true arbitration, the Court found that "according preclusive **effect** to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights." *Id.* (emphasis added).

[24] The decision accorded "preclusive effect" did not result from "arbitration," as this Court has defined that term. Arbitration does not arise out of thin air, since the *sine qua non* of any enforceable arbitration award is agreement and consent among the parties to subject their dispute to arbitration. Neither does it arise simply where—as here—a constitutional tortfeasor or a court applies that label to a nonconsensual "decisionmaker." In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court very clearly held that "[t]he Congress ... assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For **arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.**" *Id.* at 582 (emphasis added); *AT&T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) (reaffirming *Warrior & Gulf Navigation Co.*, and holding that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law"); *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991); F. Elkouri & E. Elkouri, *How Arbitration Works* 26 (3d ed. 1973) ("Fundamentally, arbitration has been and still is a product of private contract ...."), *cited with approval in Hudson*, 475 U.S. at 308 n.21: The record is clear: the Petitioners never agreed to "arbitrate" anything with District 925, and they refused to participate in any proceeding except their federal lawsuit.

at 848, *citing Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985), and *United States v. Will*, 449 U.S. 200, 218 (1980). Conceding that "our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard," this Court noted that "our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that **this guarantee serves to protect primarily personal ... interests.**" *Schor*, 478 U.S. at 848 (emphasis added).

By treating Petitioners' claim for damages as effectively precluded by an unappealed decision issued by an individual acting at the sole behest of a constitutional tortfeasor, notwithstanding Petitioners' refusal to participate in it, the courts below unconstitutionally refused to adjudicate Petitioners' damages resulting from Respondents' violation of their rights.[25] The Petition should be granted so that federal courts will know that they may not abdicate their Article III duties to adjudicate "cases or controversies" under § 1983, relegating the victims of constitutional torts to the tender mercies of nonconsensual proceedings held at the sole behest of the constitutional tortfeasor. *See McDonald v. City of West Branch*; *Alexander v. Gardner-Denver Co.*; and *Barrentine v. Arkansas-Best Freight System*.

B. The Lower Courts Are Divided

The lower courts have issued conflicting decisions over the propriety of validating an "impartial decisionmaker's" determina-

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[25]As inappropriate as this action was, the courts below also did so notwithstanding the fact that the "arbitration" occurred prior to this Court's decision in *Lehnert*, which more specifically delineated the constitutional standards for chargeability. 111 S. Ct. at 1959. The district court's final decision and order was issued on 31 May 1991, one day after this Court's decision in *Lehnert*. No reference to the standards established by *Lehnert* is made in either court's opinion.

tion of the propriety of the union's fee, or referring like issues for adjudication.

The Sixth Circuit has twice held that referral or validation is appropriate. App. A at 25a; *Lowary II*, 903 F.2d at 433.[26] Likewise, a single federal district court ordered such a referral. *Laramie*, 784 F. Supp. at 1503.

One other circuit has rejected the notion that a litigant can be forced to participate in—or accept the results of—a process invoked by a union to adjudicate these issues. *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992) ("*Hudson* ... concluded only that unions must provide nonmembers with an **alternative to litigation** .... not ... that states or unions could require nonmembers to arbitrate constitutional issues") (emphasis added). With this principle in mind, it is patently unfair for an Article III court to impose the outcome of such a proceeding upon individuals who—as here—actively refused to participate in it and sought their relief in federal court.

Other Circuits have ruled likewise. *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537, 541 (9th Cir.) (*en banc*, opinion by Kennedy, J.) (citations omitted), *cert. denied*, 469 U.S. 824 (1984) ("federal litigant has a personal right ... to demand Article III adjudication of a civil suit"); *see also Stauble v. Warrob, Inc.*, 977 F.2d 690, Nos. 92-1102, 92-1103, 1992 WL 277761, at *4 (1st Cir. 13 Oct. 1992) (nonconsensual reference of liability issue to non-Article III adjudicator is constitutionally prohibited); and *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168 (D.C. Cir. 1991) (judge "**has no discretion** to impose on parties against their will 'a surrogate judge'") (emphasis added), *citing La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (party has a right to "trial before the court on basic issues

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[26] The Seventh Circuit has also suggested that federal courts should not entertain challenges to the amount of the fee, even after finding constitutional violations. *Hudson v. Chicago Teachers' Union, Local No. 1*, 922 F.2d 1306, 1316 (7th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2852 (1991).

involved in the litigation"); *cf. United States v. Weichert*, 836 F.2d 769, 772 (2d Cir. 1988), *cert. denied*, 488 U.S. 1017 (1989) (factfinding regarding restitution may not be referred in criminal context).

There is a clear split of authority over the propriety of referral of damages determinations to "surrogate judges." *In re Bituminous Coal Operators' Ass'n*, 949 F.2d at 1169. The Petition should be granted to correct the departure of the courts below from the accepted and usual course of judicial proceedings, as well as resolve the split of authority of the imposition of a nonconsensual decisionmaker's determinations of legal and constitutional questions upon civil rights litigants.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to the Sixth Circuit and set the case for plenary briefing and argument on these important questions presented.

Respectfully submitted,

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APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

23 July 1992

[970 F.2d 1523]

Carol WEAVER; Vicki Hahn; Sharron L. Carroll; Angela Segrist; Lois Kupferberg; Alice Tennenbaum, Plaintiffs-Appellants (91-3557), Cross-Appellees,

v.

The UNIVERSITY OF CINCINNATI, Defendant, Joseph L. Steger, President, University of Cincinnati; Jill Parris, Interim Vice-President for Human Resources and Human Relations for the University of Cincinnati, Defendants-Appellees, Cross-Appellants (91-3605), District 925, Service Employees International Union, Defendant-Appellee, Cross-Appellant (91-3604).

Nos. 91-3557, 91-3604 and 91-3605.

United States Court of Appeals,
Sixth Circuit.

Argued April 2, 1992.

Decided July 23, 1992.

* * * *

Before: KEITH, Circuit Judge; LIVELY and TIMBERS,* Senior Circuit Judges.

LIVELY, Senior Circuit Judge.

This case, brought under 42 U.S.C. § 1983, involves a challenge by nonunion employees of a public employer to the "fair share" or "agency" fees deducted from the plaintiffs' paychecks pursuant to a collective bargaining agreement

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* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

between their employer and a union that had been certified as the exclusive bargaining representative. The parties filed cross-motions for summary judgment. The district court found that the fair share fee calculation was valid and that the union's ratification procedures and disclosures were constitutionally acceptable in all but two respects. Accordingly, it granted summary judgment to the defendants (individual officials of the public employer and the union) on most issues and summary judgment for the plaintiffs on two issues. Both sides have appealed.

I.

This is the second appeal. The court stated the facts fully in its opinion reversing the district court's denial of the plaintiffs' motion for a preliminary injunction, and we will summarize them briefly here. See *Weaver v. University of Cincinnati*, 942 F.2d 1039 (6th Cir.1991) (*Weaver I*).

A.

District 925, Service Employees International Union (the union), is the duly certified representative of approximately 1200 office employees of the University of Cincinnati. Effective October 1, 1989, the union and the university entered into a collective bargaining agreement, which contained, in Article IV, the following provisions:

> *Section 1. Fair Share.* The Union shall fairly represent all employees covered under this Agreement. Therefore, as a condition of employment, employees who are covered under this Agreement shall, within 60 days of employment, or within 60 days of the effective date of this Agreement (whichever is later) either execute a union membership and payroll dues deduction form, or shall have a fair share fee deducted from their payroll checks.
>
> * * *

> *Section 3. Hold Harmless.* The Union further agrees to save the University harmless from any legal action growing out of these checkoff deductions that may be instituted by an employee involved therein before a court, or any other body asserting or having jurisdiction, against the University as well as reasonable costs and expenses involved in defense of any such action....

In accordance with the international union's guidelines for administration of fair share fees, on May 3, 1990, the local union sent a letter to the 408 represented employees who were not union members, explaining that, even if they did not join the union, a fair share fee equal to union dues would be deducted from their paychecks. (Letter of May 3, 1990). The union then explained that employees could "dissent" from such a deduction by sending a letter by certified mail to the local union office within 30 days of receipt of the May 3 letter. Dissenters would be charged a fair share fee equal to 90% of union dues, an amount the union determined included all union expenses fully chargeable to nonmembers under federal law, but excluded: voter registration; members-only benefits; litigation not related to bargaining unit matters; and contributions to charitable and political organizations, political candidates, ideological causes or foreign affairs.

The May 3 letter also provided guidelines for nonmembers to "challenge" the fair share calculation, explaining that employees could send a certified letter to District 925's National Secretary within 30 days of the receipt of the May 3 letter. A challenge would cause the union to place the challenger's fair share payments in an interest-bearing escrow account and would invoke an internal appeal procedure whereby a three-member committee (composed of at least two union executive officers) would review the fair share calculations under state and federal law. The May 3 letter further advised that a challenger could appeal the internal committee's decision by notifying the union, which would submit the matter to an impartial arbitrator selected by the American Arbitration Association (AAA).

Arbitration proceedings would conform to the AAA's *Rules for Impartial Determination of Union Fees.*

Finally, the May 3 letter included a one-page summary of District 925's Fair Share Calculation for 1989. Although an independent certified public accountant, the Samuel Sindel Company (Sindel), had prepared an audit of the local and national union's expenditures and the fair share calculation, this audit was not included in the May 3 letter. The Sindel audit considered reports from 14 joint bargaining councils to whom District 925 paid fees, which disclosed in general terms how District 925's payments were used. Based on these reports, Sindel concluded that approximately 45% of the fees paid by District 925 in 1989 to the joint bargaining councils was chargeable to nonunion employees. The reports of the joint bargaining councils also were not included in the May 3 mailing to nonunion employees. Instead, nonunion employees were merely informed that "[a]n employee filing a challenge will have the right to inspect any of the financial records at the offices of the Union that formed the basis for the Union's calculations."

B.

District 925 received 157 dissents and 55 challenges from nonmember employees. Beginning in June 1990, the University deducted 90% of District 925's union dues from the paychecks of the 157 dissenters. District 925 placed into an escrow account all of the fees deducted from the 55 challengers' paychecks.

Following a hearing before the internal review committee, in which some of the dissenters refused to participate, that committee upheld the 90% fair share fee calculation. When some of the dissenters appealed the committee's decision to District 925's National Secretary, the union requested arbitration by the AAA. The AAA selected an arbitrator. While arbitration was pending, six dissenters filed this action seeking, inter alia, an injunction against all fair share deductions and a declaratory judgment that the indemnification agreement in

Article IV, Sec. 3 of the collective bargaining agreement was void.

Some of the challenging nonunion employees refused to recognize the arbitrator's authority and requested a postponement of arbitration proceedings until the district court action was concluded. The arbitrator held a hearing without these protestors' participation. Thereafter the arbitrator issued an Interim Award and opinion, finding that most of the information in the May 3 letter satisfied constitutional requirements. The arbitrator did find several defects in the union's notification procedures. First, she found constitutionally inadequate the union's requirement that dissents and challenges be sent by certified mail because it placed too great a burden on the objector, and she determined that *ex-post* acceptance of other-than-certified mail did not cure the constitutional violation. Second, the arbitrator found that the internal appeal procedure for challengers violated *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), because the union did not use impartial hearing officers and because the procedure prevented the challengers from having an expeditious arbitration. Third, the arbitrator found that the use of the word "rebate" in District 925's financial disclosure sheet did not adequately apprise nonunion employees that the money so identified was used to contract for the services of affiliated unions in locations where District 925 did not have an office. The arbitrator enjoined District 925 from continuing any of these practices. She then ordered the union to send to the nonunion clerical employees a "Revised Notice" correcting these errors and offering a new opportunity for challenging and dissenting from the fair share fee to any employee who did not previously dissent or challenge.

Pursuant to the arbitrator's orders, District 925 sent a new letter to nonunion employees represented by the union on November 20, 1990. The letter outlined the results of the fair share fee arbitration, and then offered lists of chargeable and nonchargeable union expenses that were virtually identical to the lists in the May 3 letter to nonunion employees. The letter

again contained a summary of the audit of District 925's calculation of the fair share fee, and this time District 925 also appended to each letter a full copy of the 1989 Sindel audit. The November 20 letter set forth new dissent and challenge procedures which did not require the use of certified mail and allowed employees to dissent and challenge in the same letter. The renotification letter then provided that any nonmembers who filed dissents or challenges for the first time under the renotification procedure would be rebated the 10% of dues they had been paying since the deductions began.

II.

As noted, the plaintiffs filed this action in the district court while the arbitration proceedings were in progress. When their motion for a preliminary injunction was denied, the plaintiffs perfected an interlocutory appeal to this court (*Weaver I*). The parties continued to litigate in the district court pending the outcome of the interlocutory appeal.

A.

The parties engaged in discovery, primarily concerning a motion by the plaintiffs for certification of a class consisting of approximately 400 university employees represented by District 925 for collective bargaining who were not members of the union as of May 3, 1990. On advice of counsel, at her deposition the plaintiff Carol Weaver refused to answer any questions concerning her reason for choosing not to join the union or the content of her discussions with co-workers concerning unionization. She based her refusal on First Amendment and attorney-client privilege grounds.

The district court denied the defendants' Motion to Compel Answers to Deposition questions, recognizing that "Plaintiff has First Amendment rights and that no inquiry may be made into matters that are otherwise privileged." Noting, however, that "[t]he underlying philosophy of a class action requires a court to inquire with great particularity into the allegations that a class

should be certified," the district court conditionally denied the plaintiffs' Motion for Class Certification. The court gave the plaintiff Weaver an opportunity "to reconsider her position on the questions asked in the deposition" with the option of filing a new motion for class certification upon such reconsideration.

B.

The district court then ruled on the parties' cross-motions for summary judgment.[1] The district court upheld the method by which the arbitrator was chosen and found that changes in the procedures adopted by the defendants had cured all of the *Hudson* defects but one. In addition, the district court found that the indemnification provision of the agreement was void as against public policy. More specifically, the district court set forth its seven conclusions of law:

1. All of the constitutional deficiencies in District 925's May 3 notice to nonunion employees were cured by the November 20 Renotification.

2. The inclusion of the Sindel audit in the November 20 Renotification remedied District 925's failure to include the audit in the May 3 notice.

3. "District 925's failure to identify those affiliates to whom it makes payments, and its failure to provide audited financial disclosure of the affiliates' use of these funds, was a violation of the *Hudson* requirements."

4. The arbitrator correctly decided that the fair share fee calculation was valid.

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[1] The district court dismissed the claims for damages against the university as barred by the Eleventh Amendment. The plaintiffs did not appeal this ruling.

5. The collection of agency fees from nonmembers based upon a percentage of their salary is permissible.

6. Under *Hudson*, nonmembers who do not affirmatively challenge or dissent may be charged the full union dues.

7. The "Hold Harmless" clause in the collective bargaining agreement is void as against public policy. (citing *Tierney v. Toledo*, 824 F.2d 1497 (6th Cir.1987)).

Weaver v. University of Cincinnati, 764 F.Supp. 1241, 1247-48 (S.D.Ohio 1991).

The district court entered its final judgment on May 31, 1991. The parties promptly filed notices of appeal and cross-appeal. All of this occurred after oral arguments but before this court decided the appeal from denial of the plaintiffs' motion for a preliminary injunction.

C.

On August 26, 1991, this court decided the interlocutory appeal, reversing the district court's denial in the plaintiffs' motion for a preliminary injunction. In *Weaver I* this court found that the procedures outlined in the May 3 letter were constitutionally defective in at least three respects. First, the disclosure concerning payments by District 925 to affiliated unions was inadequate. Second, the objection procedure requiring notice by certified mail was unconstitutionally burdensome. Third, the internal union appeal procedure failed to satisfy *Hudson*'s requirements. 942 F.2d at 1046-47. On the basis of these findings, the court held that the district court erred in concluding that the plaintiffs had failed to establish that they and other nonunion employees represented by the union had suffered irreparable injury.

This court reversed the district court's order and remanded the case for the district court to grant the preliminary injunction. *Id.*

Upon receiving this court's mandate in the preliminary injunction appeal the district court entered an order directing the defendants "to cease collecting fair share fees from the wages of Plaintiffs and to return to them all such charges that have been collected to this date together with interest thereon." No notice of appeal was filed from this order, and the defendants filed with the district court a notice of compliance.

III.

When the district court entered its final decision on the merits while the interlocutory appeal was pending, the parties should have made a motion in this court to consolidate the two appeals. Ordinarily, the district court is divested of jurisdiction in a case when one or more of the parties files a notice of appeal. There is authority, however, which holds that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding other issues involved in the case. See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379, 105 S.Ct. 1327, 1331, 84 L.Ed.2d 274 (1985) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982) (per curiam)); *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir.1987). Judicial economy is served by merging an appeal from denial of a preliminary injunction with the appeal from final judgment in a case where an appeal from the final judgment is taken prior to a decision on the interlocutory appeal. See, e.g., *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156, 162, 26 S.Ct. 404, 406, 50 L.Ed. 707 (1906); *Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513 (1992); *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir.1976). If that had been done in this case a single panel of the court could have decided all the issues. It might have required a second argument, given the sequence of events, but judicial time would have been saved by having all the issues

considered and decided by one three-judge panel. Nevertheless, we now have the entire record before us and we will decide all of the issues presented by the parties in this appeal.

A.

The plaintiffs contend that the district court erred in denying their motion for class certification. They argue that they seek to represent all nonmember employees who are "potential objectors" to the agency shop fee and that they will fairly and adequately protect the interests of the class. They assert that they have interests in common with all such nonmember employees because they are only seeking adequate procedural safeguards under *Hudson*.

The plaintiffs frame their argument in terms of being required to waive First Amendment privileges as a condition to obtaining class certification. This refers to the fact that the district court refused to certify the class as requested because the plaintiff Weaver refused to answer questions concerning her motivation for objecting to the agency fee and for bringing this action. The district court pointed out that there could be different reasons for an employee's unwillingness to have deductions from her paycheck paid to a union, and that until the motivation of the plaintiffs is known it is impossible to determine whether or not the plaintiffs can satisfy the requirements of Fed.R.Civ.P. 23 for class representation.

Next, the plaintiffs contend that the district court erred in holding that a union may presume consent to fair share payments by those nonmember employees who remain silent rather than filing challenges or dissents. They contend that a nonmember must give specific authority for a union to speak or act on her behalf. The only presumption from silence, they say, is that a nonmember employee declines to have the union collect any money from her in excess of the employee's "pro rata share of the union's costs of collective bargaining, contract administration, and grievance adjustment."

The plaintiffs also seek an order requiring the union to refund all fees previously collected, and a permanent injunction against further collections on the ground that the union has never met *Hudson*'s procedural requirements.

Finally, the plaintiffs challenge the district court's deference to the arbitrator's decision, arguing that their constitutional claims should have been adjudicated in the federal courts before the arbitrator considered the chargeability of certain union expenditures. They contend that because they were not given the opportunity to participate in the selection of the arbitrator, the AAA proceedings were not a true arbitration. They also assert that the arbitrator's decisions regarding the chargeability of certain items were really decisions pertaining to *Hudson*'s notice requirements and were therefore issues for the district court to decide.

B.

The union maintains that the district court did not abuse its discretion in denying the motion for class certification. The union states that the plaintiffs failed to satisfy their burden of showing that they could adequately represent the interests of all members of the proposed class. They contend that discovery of the plaintiffs' reasons for not joining the union and filing this lawsuit was necessary to determine whether or not their interests were antagonistic to those nonmember employees who did not dissent from or challenge the deduction of the agency fee equal to full union dues and those who dissented from paying non-chargeable items but did not challenge the items that the union deemed chargeable in the agency fee.

The union contests the plaintiffs' request for a refund of all of the fees withdrawn from the nonmembers' paychecks, arguing that the employees are only entitled to a refund of that portion of the fee that was determined to be nonchargeable by the arbitrator, which in this case totals approximately 1.15% of the fees withdrawn.

Finally, District 925 contests the plaintiffs' attack on the opt-out procedure by which dissenters affirmatively register their opposition to being charged full union dues, arguing that *Hudson* and our decisions fully support the opt-out procedure.

Regarding the validity of the arbitration, District 925 argues that the district court properly considered and affirmed the arbitrator's findings on chargeability issues and maintains that these issues can be considered separately from the notice issues. District 925 also defends its selection of the AAA to appoint an arbitrator unilaterally, asserting that this procedure satisfied *Hudson*.

The university officials, joined by District 925, cross-appeal the district court's determination that the indemnification clause in the collective bargaining agreement was facially void as against public policy. They argue that without such a clause, public employers would be forced to audit unions' finances. They contend that an indemnification clause is facially void only if it is part of a collective bargaining agreement which encourages unconstitutional violations of employees' rights. Finally, both appellees argue that the policy considerations set forth in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), will be undermined without indemnification clauses because public employers will refuse to enter into fair share agreements.

IV.

We consider first the issue of class certification.

A.

The plaintiffs contend that the district court erred by refusing to certify the class as requested because they satisfied the requirements for class representatives. They argue that all potential class members have interests in common and that they will provide adequate representation. The defendants respond that the plaintiffs failed to satisfy their burden of demonstrating

that they could adequately represent the proposed class. There are factors indicating that various nonmembers have different reasons for refusing to join the union, thus negating commonality of purpose.

For example, the record reveals that some university employees had begun to circulate a newsletter called "The Onion" which was dedicated to "peeling away the union facade." The newsletter was intended to challenge any union presence among clerical workers. As the Seventh Circuit Court of Appeals noted in *Gilpin v. AFSCME, AFL-CIO*, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917, 110 S.Ct. 278, 107 L.Ed.2d 258 (1989), when it refused to find that a district court erred in denying certification to a class of nonunion employees:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members.

875 F.2d at 1313. The publishers of "The Onion" could have interests that conflict with those of other nonunion employees who are merely "free riders." Because the named plaintiffs' motivations are not clear, they may not be able to represent all nonmembers effectively in a class action suit.

Further, on appeal, the plaintiffs assert that they only wish to represent the proposed class in order to ensure that their procedural rights under *Hudson* are protected. However, they sought punitive damages in the lower court and seek on appeal the return of all of the agency shop fees assessed before the union met *Hudson*'s procedural requirements. This court has held that such a recovery would be an unnecessary windfall for

the nonunion employees. *Lowary v. Lexington Local Bd. of Educ.*, (*Lowary II*) 903 F.2d 422, 433 (6th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 385, 112 L.Ed.2d 396 (1990). The Court of Appeals for the Seventh Circuit in *Gilpin* described a similar proposed remedy as "punitive" and found that this remedy would only satisfy the wishes of those employees who were hostile to unions. *Gilpin*, 875 F.2d at 1313.

Hence, even if the plaintiffs in this case only wish to guarantee that all nonunion employees' rights under *Hudson* are protected, their choice of remedy is arguably antagonistic to the wishes of other employees. It is entirely possible that those approximately 243 nonunion employees who did not dissent from or challenge the agency shop fee do not wish to have all of their fees returned.

Finally, the *Gilpin* court noted that certification of the class in such a case was not crucial because once the plaintiffs had secured any relief, it would inure to the benefit of all the members of the proposed class anyway. *Id.* Such is the case here. For example, the arbitrator's decision that the union's notification to nonmember employees was deficient led to the union's renotification to all of the nonmembers, giving them an additional opportunity to dissent from or challenge the agency shop fees.

B.

Our standard of review when considering a district court's refusal to grant class certification is abuse of discretion:

> The district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based on the particular facts of the case, should not be overturned absent a showing of abuse of discretion.

Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir.1988). The particular facts of this case indicate that there was no abuse of discretion.

Because the named plaintiffs refused to reveal their reasons for declining to join the union or for bringing this action, there simply was not any information before the court regarding the plaintiffs' motivations for instituting this proceeding. On the other hand, the district court did have some indication that the named plaintiffs' interests could be divergent from those of other members of the proposed class. Furthermore, the district court denied the motion for certification conditionally, and indicated that it would reconsider upon a showing by the plaintiffs that they meet Rule 23's requirements to serve as class representatives. We find no abuse of discretion in the district court's ruling.

V.

The plaintiffs argue that nonunion employees' silence cannot be construed as a waiver of their right to dissent from paying for the union's ideological expenditures with their agency shop fees. Hence, employees should be required to pay only those union costs related to collective bargaining unless they affirmatively consent to pay for the union's political and ideological expenditures. This assumes that the revised notice of November 20 was constitutionally defective. If that notice cured the deficiencies of the May 3 letter, as found by the district court, then a more accurate characterization of the plaintiffs' argument would be that nonmember silence in response to sufficient opportunity for dissenting from paying nonchargeable union expenses indicates acquiescence.

A.

The *Abood* Court recognized that fair share agreements impinge on nonmember employees' rights, but held that forced contribution, in and of itself, did not violate those employees' rights because the government had strong public policy interests in labor peace and the elimination of "free riders." 431 U.S. at 222, 225, 97 S.Ct. at 1792, 1794. Rather, the *Abood* Court determined, nonmember employees' First Amendment rights were violated only when their exacted funds were used to

support ideological causes which they opposed. *Id.* at 235, 97 S.Ct. at 1799.

Abood adopted the reasoning and rulings in the Supreme Court's earlier Railway Labor Act cases. See *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 238, 76 S.Ct. 714, 721, 100 L.Ed. 1112 (1956); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 744, 81 S.Ct. 1784, 1787, 6 L.Ed.2d 1141 (1961); *Brotherhood of Ry. and Steamship Clerks v. Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158, 1163, 10 L.Ed.2d 235 (1963). Together these cases stand for the proposition that dissenting union and nonunion members must inform the union that they oppose the use of their funds for ideological expenditures. Considering whether this requirement unconstitutionally burdened the employees in a case involving employees of a public body, the Court determined that a public employee does not have a weightier First Amendment interest than a private employee. *Abood*, 431 U.S. at 229-30, 97 S.Ct. at 1796-97.

Thus the RLA cases and their progeny offer strong reasons to reject the plaintiffs' arguments. See, e.g., *Street*, 367 U.S. at 774, 81 S.Ct. at 1803 ("dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee"); *Allen*, 373 U.S. at 119, 83 S.Ct. at 1162 (an employee who does not prove he objected to the use of his fees for ideological purposes cannot recover that portion of the fee); *Hudson*, 475 U.S. at 309, 106 S.Ct. at 1077 ("the nonunion employee has the burden of objection"); see also *Damiano v. Matish*, 830 F.2d 1363, 1369 n. 8 (6th Cir.1987) ("[t]he burden is on the individual employee to object to expenditures by the Union for political or ideological purposes").

B.

There are practical reasons for rejecting the plaintiffs' argument. First, the *Hudson* procedural safeguards upon which the plaintiffs rest most of their claim were designed specifically to complement the hierarchy of interests described in *Abood*:

> We reiterate that these characteristics are required because the agency shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection.

475 U.S. at 309, 106 S.Ct. at 1077. It follows that if employees did not bear the burden of objection, many of *Hudson*'s procedural safeguards would be less restrictive on the union's collection activity.

Second, under *Hudson*, dissenting employees will never pay for nonchargeable expenses they oppose under the advance reduction system. *Id.* at 309-10, 106 S.Ct. at 1077-78; see also *Tierney v. City of Toledo*, (*Tierney II*) 824 F.2d 1497, 1504 (6th Cir.1987). They will always be given adequate time to object to paying nonchargeable expenses before any money is taken from their paychecks.

More importantly, when the union has failed to follow proper notification procedures, the *Lowary II* court found that an employee's failure to object to the deduction of agency fees did not constitute abandonment of a known right. 903 F.2d at 430. Until *Hudson*'s requirements are satisfied, an employee who does not object to paying for nonchargeable items will be allowed subsequent opportunities to object.

The Court of Appeals for the Ninth Circuit recently considered this very issue in *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258 (9th Cir.1992), and reached this same conclusion. After tracing the history of the burden on dissenters to object to the use of their fees for ideological causes, the *Mitchell* court considered the plaintiffs' argument that the earlier Supreme Court cases were inapposite to their own claim because those cases considered the claims of a mixed group of employees—both members and nonmembers of the union. According to the *Mitchell* plaintiffs, because they were all nonmembers, they could be assumed to disagree with the union's political activities. The court disagreed:

> The [Supreme] Court, however, was dealing with an issue of individual constitutional rights and held that all plaintiffs, not just those who were union members, were required to voice their objection to payment of the full agency fee.

963 F.2d at 262.

The court then addressed the nonunion plaintiffs' argument that their right not to pay for activities unrelated to collective bargaining was analogous to a criminal defendant's fundamental constitutional rights and hence required their intentional relinquishment of the right—an argument almost identical to one made here. The *Mitchell* court rejected the analogy:

> The case before us, however, reveals none of the coercive elements so palpable in a police confrontation. The Supreme Court has never suggested that employees who are offered the opportunity to object to the union fee deduction and do not do so act under any compulsion. There is thus no basis, either factual or legal, for the district court's conclusion that plaintiffs were "compelled" to acquiesce, in violation of their First Amendment rights.

Id. at 262. The *Mitchell* court found a closer analogy in the "opt-out" procedure utilized in class action lawsuits and found that such a procedure in this context adequately protected the employees' constitutional rights. An "opt-in" procedure, the court found

> would unduly impede the union in order to protect the "relatively rare species" of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes.

Id. (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813, 105 S.Ct. 2965, 2975, 86 L.Ed.2d 628 (1985)).

Hence, the plaintiffs' argument must fall because it seeks to shift the balance of interests underlying all of the Supreme Court's pronouncements on the subject of agency shop fees. An "opt-in" procedure would greatly burden unions while offering only a modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson*.

VI.

A.

The plaintiffs also seek a return of all fees collected from them under the two union notices. This argument is foreclosed by our decision in *Lowary II*. In that case we considered the plaintiffs' request for return of all the fees previously paid. We denied the request, explaining that such an award would undermine *Abood*'s policy concern that every employee contribute to the cost of collective bargaining. 903 F.2d at 433 (citing *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800). The court concluded that *Hudson* did not disturb the Supreme Court's earlier decision in *Allen* "that the proper remedy for an unconstitutional fee collection is not a refund of the total fee," but is the refund of the portion of the exacted fees proportionate to the union's nonchargeable expenditures. *Id.* (citing *Allen*, 373 U.S. at 122, 83 S.Ct. at 1163). The court added that the plaintiffs' request constituted a misinterpretation of the release of escrowed fees in *Lowary v. Lexington Local Bd. of Educ.*, (*Lowary I*) 854 F.2d 131 (6th Cir.1988): "[P]laintiffs were not guaranteed a free ride after appropriate procedures for determining the proper fee amount were established." *Id.* The court reasoned that its decision to "allow[ ] unions to retain the chargeable portions of unconstitutionally collected fair share fees" satisfied the Supreme Court's view of awards in 42 U.S.C. § 1983 actions because the statute was not established to provide "'a deterrent more formidable than that inherent in the award of compensatory damages.'" *Id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 256-57, 98 S.Ct. 1042, 1048, 55 L.Ed.2d 252 (1978)). Finally, the court concluded that its decision was correct because "[t]o allow

plaintiffs to recover for both chargeable and nonchargeable expenditures would constitute a windfall to plaintiffs." *Id.*

The plaintiffs appear to argue that *Lowary II* was based on the mistaken assumption that denying nonunion employees a full refund of chargeable fees for *Hudson* violations would not serve as encouragement to unions to disregard *Hudson*. As our earlier decision in this case (*Weaver I*) demonstrates, by granting a preliminary injunction barring continuation of fee collecting when a defective notice has been sent, the courts have a quick and efficient remedy for such a *Hudson* violation. *Lowary II* is sound law on this point and we see no reason to request reconsideration of its holding by the court sitting en banc.

Tierney II dictates that a union cannot exact fees from any nonmember until a plan with all of the procedural safeguards is "established and operating." 824 F.2d at 1504. But here the plaintiffs would have the court extend *Tierney II*'s prospective requirements retrospectively, a suggestion this court clearly declined to adopt in *Lowary II*.

Where chargeable fees have been collected under a plan that does not comport with *Hudson*, the proper remedy is an injunction. *Lowary I*, 854 F.2d at 134-35. In the absence of willful or malicious constitutional violations of *Hudson*'s procedures, punitive damages in the form of a full refund of chargeable fees are unwarranted. See *Lowary II*, 903 F.2d at 433.

B.

The plaintiffs also requested a permanent injunction to prevent the union from collecting any additional agency fees until it followed constitutionally adequate procedures for notification. The district court denied this remedy, noting that the appeal from its denial of a preliminary injunction was pending. Immediately upon receiving the mandate from this court reversing its decision, however, the district court entered a preliminary injunction that is still in place. Thus, the union has not collected any agency shop fees from the nonunion

employees since that time (August 1991). In view of our decision that the November 20 notice cured the deficiencies in the May 3 letter, we have no cause to consider the request for a permanent injunction.[2]

VII.

The plaintiffs present two arguments to bolster their contention that the district court erred in ratifying the arbitrator's decision.

A.

First, the plaintiffs assert that the person unilaterally chosen by the AAA could not serve as an arbitrator because the plaintiffs were not allowed to participate in the arbitrator's selection. This contention directly contradicts our approval of this method of choosing an arbitrator in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir.1987). The *Damiano* court explained:

> In the instant case, the AAA itself has defined specific policies to govern the selection of the arbitrator who would hear such challenges. Under its Rules for Impartial Determination of Union Fees, effective June 1, 1986, an arbitrator who has been tentatively selected to hear a challenge must "disclose any circumstances likely to create a presumption of bias." Thereafter, the AAA may elect, in its discretion, to disqualify that individual. In addition, any participant to the proceeding "may challenge an Arbitrator for cause by promptly notifying the AAA of [the] objection." Because the procedure adopted by the Union in this case would provide an opportunity for the participants to challenge the selection of a particular arbitrator for identifi-

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[2] Because the union has offered to rebate that portion of the nonunion employees' fees attributable to payments to affiliates, see Conclusion, infra, any potential infirmity in the November 20 notice regarding affiliate payments does not affect our decision here.

> able bias, and because the selection of the arbitrator would not be left solely to the discretion of the Union, this part of the Union's amended policy appears to meet the procedural requirements set forth in *Hudson*.

830 F.2d at 1372. The plaintiffs did not challenge Arbitrator Florman's qualifications or impartiality after she was chosen by the AAA; they merely argued that they should have had a voice in her selection.

B.

The plaintiffs' second argument against ratification of the arbitrator's decision is that an arbitrator should not determine which portion of the exacted fees were chargeable to nonmember employees before a district court decides the merits of a constitutional challenge to the union's collection procedures. While no court has specifically addressed this sequence of adjudication, *Hudson* and *Lowary II* imply that this sequence can be satisfactory.

In *Hudson*'s discussion of how an "expeditious arbitration" could provide "a reasonably prompt decision by an impartial decisionmaker," the Court added a caveat: "The arbitrator's decision would not receive preclusive effect in any *subsequent* § 1983 action." 475 U.S. at 308 n. 21, 106 S.Ct. at 1077 n. 21 (emphasis added). Of course, the *Hudson* Court was envisioning the union enacting a constitutionally adequate plan and then submitting to an impartial decisionmaking process.

The validity of determinations made by a satisfactorily-selected arbitrator pursuant to a collection plan with other constitutional infirmities was considered by this court in *Lowary II*. The court emphasized that the Supreme Court had indicated "that courts should not involve themselves in the factual inquiries involved in making a chargeability determination." 903 F.2d at 433 (citing *Allen*, 373 U.S. at 123-24, 83 S.Ct. at 1164-65; *Abood*, 431 U.S. at 240, 97 S.Ct. at 1802). Rejecting the

nonunion employees' argument that the arbitration was invalid, the court explained:

> Clearly, any determination by an independent arbitrator "would not receive preclusion effect in a subsequent § 1983 action." In this case, however, plaintiffs do not claim that the decisionmaker's determinations were improper. Rather, plaintiffs only object to the use of the procedure. We also reject plaintiffs' argument that the use of this "decisionmaker" is an exhaustion of remedies procedure contrary to the teachings of *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), and other cases which suggest that plaintiffs may bypass all union procedures in a § 1983 challenge. Plaintiffs are not being required to operate under the unconstitutional plan. Rather, the District Court has lifted this procedure from the plan and instituted it as the procedure by which the nonchargeable portions of the improperly collected fees should be determined.

903 F.2d at 433-34 (footnote and citation omitted).

Lowary II's facts were slightly different from the case before this court. In *Lowary II*, the district court decided that a union's collection plan violated *Hudson* and then had the parties submit their chargeability issues to an impartial decisionmaker. *Id.* at 426. Nevertheless, the arbitrator was chosen in *Lowary II* and the present case under a plan with constitutional infirmities.

It follows from the reasoning of both *Hudson* and *Lowary II* that chargeability issues may be decided by an arbitrator whose selection satisfied *Hudson*, even if other portions of a union's collection plan do not satisfy *Hudson*, before a district court considers a constitutional challenge to the collection plan. Hence, the arbitrator's finding that "with the exception of the 'Professional Fees & Expenses,' District 925/SEIU met its burden of establishing, with reasonable precision and detail, the constitutionally permissible bases for its chargeability," was properly made before the district court considered the plaintiffs'

§ 1983 complaint. The plaintiffs were not prejudiced by this procedure because this decision did not have a "preclusive effect" on their federal suit. Contrary to the plaintiffs' argument that the district court "abdicated" its responsibility by considering the arbitrator's findings, it is clear that the district court understood and performed its proper role in the sequence of proceedings. In its opinion the district court noted:

> The *Hudson* Court does advise that an arbitration is a legitimate first step in the evaluation of the validity of an agency fee plan. A district court may examine and ultimately ratify determinations made by a properly selected arbitrator upon a finding that an arbitrator's decision was correct.

764 F.Supp. at 1245.

The plaintiffs also claim that the arbitrator erroneously decided questions of notice, rather than chargeability; that notice issues should have been presented only to the district court. In the present case the arbitrator determined *Hudson* notice issues in the course of a legitimate adjudication of chargeability issues. These determinations certainly did not have a preclusive effect on the district court, which engaged in a comprehensive examination of *Hudson*'s requirements. Although nonunion employees cannot be required to submit their constitutional claims to an arbitrator, if notice issues are addressed in the course of a "reasonably prompt decision by an impartial decisionmaker" of chargeability issues, *Hudson*, 475 U.S. at 309, 106 S.Ct. at 1077, and the nonunion employees have the option of presenting those claims anew before a court in a § 1983 action, the nonunion employees' constitutional rights have been protected.

The plaintiffs further argue that where the union clearly notifies nonmember employees it is charging them for expenses which either are not chargeable under existing precedent or are subsequently found not to be chargeable, issues of chargeability become notice issues and cannot be considered by an arbitrator.

We find this argument to be without merit. Arbitrators determine items' chargeability under the guidance of Supreme Court and court of appeals decisions that set forth the constitutionality of charging various expenses to nonmembers. The arbitrators' decisions are then subject to review by a court at the parties' request. If we were to adopt the plaintiffs' definition of chargeability, we would eliminate entirely the valuable role arbitrators play in evaluating fair share agreements. Inquiries into chargeability are findings of fact, *Lowary II*, 903 F.2d at 433, and attempting to change their label does not make them issues of law.

We find no merit in any of these arguments for requiring the district court to reject the arbitrator's findings and decision. The district court did not abdicate its responsibilities; rather, it followed approved procedures.

VIII.

The defendants cross-appeal from the district court's conclusion that the indemnification clause in the collective bargaining agreement is void as against public policy.

A.

There is a dearth of published opinions at the court of appeals level on the validity of contract provisions that indemnify public employers against liability to employees for unconstitutional acts and practices. In *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70 (2d Cir.1982), the court upheld a district court finding that a "hold harmless" clause in a labor agreement that provided a lower pay scale for female coaches in a school system than for their male counterparts was invalid as "patently contrary to civil rights policy." *Id.* at 71.

The *Stamford* plaintiffs sued under § 1983, seeking relief under both Title VII of the 1964 Civil Rights Act and the Equal Pay Act as well as the Constitution.

The court discussed public policy generally and more particularly under federal civil rights laws, and easily concluded that there is a strong public policy against discrimination in employment on the basis of sex. Although the union that agrees to the provision may be held liable independently, nevertheless

> if the "hold harmless" clause is enforceable, employers will have little reason to be concerned over whether labor agreements discriminate against women, knowing full well that if they are later found to have discriminated, they will be totally compensated for any injuries resulting from the discrimination. Labor unions, on the other hand, will have little incentive to pursue anti-discrimination claims or lawsuits when they are aware that they will have to pay from their own pockets for the fruits of a victory.

Id. at 73-74. The court also reasoned that, although the district court had not found that the school board acted willfully in agreeing to the indemnification clause, "the logical reason why the contract contained a 'hold harmless' clause was because at least one of the parties (probably, the Board) thought that there was a good chance that the pay schedule in the Agreement would be held discriminatory." *Id.* at 74.

The Court of Appeals for the Third Circuit dealt with the issue in *Hohe v. Casey*, 956 F.2d 399 (3d Cir.1992). Like the present case, *Hohe* was a § 1983 action by nonunion state employees over "fair share" payments to a union. The plaintiffs and the court recognized that the state and high state officials were immune from any claim for damages, but sought declaratory and injunctive relief against implementation of a state statute permitting a fair share agreement between the state and the union that was the exclusive bargaining representative for state employees. The agreement contained an indemnification clause under which the union agreed to hold the state harmless against "all claims, suits, orders, or judgements brought or issued against the Employer as a result of the action taken or not taken by the Employer under the provisions of this Article." *Id.* at 411. Unlike the clauses in the present case and in *Stamford*, the

clause in *Hohe* did not indemnify the employer against costs and expenses involved in defending any legal action growing out of the implementation of the fair share provision of the agreement.

The *Hohe* court noted that this court had held an indemnification clause in an agreement between a public employer and a union invalid in an unpublished opinion. See *Cramer v. Matish*, 924 F.2d 1057 (6th Cir.1990) (Table), discussed infra. The court held, nevertheless, that "invalidation of the indemnification clause is not required by the First Amendment." *Hohe*, 956 F.2d at 412. The court concluded that the clause did not remove all incentive for the state to ensure that its employees were required to pay only a fair share fee that passed constitutional muster because the state "may be called upon to defend the deduction of fees and may be enjoined from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with constitutional requirements." *Id.* at 411. Distinguishing *Stamford*, the court noted that the clause before it did not indemnify the state for costs or fees involved in defending a claim. The court concluded that even if the union were to indemnify the state for costs and fees, that would not matter because the union, upon whom most of the obligations fall, "has a significant incentive to ensure that its procedures comply with the Constitution." *Id.* at 412.

B.

As noted earlier, this court held an indemnification clause invalid in *Cramer v. Matish*, an unpublished decision. The decision appears, however, at 1990 WL 169640. In *Cramer* we stated:

> Under *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid. *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192 (7th Cir.1984), *aff'd*, 475 U.S. 292 [106 S.Ct. 1066, 89 L.Ed.2d 232] (1986); *Lowary v. Lexington Local Bd. of Educ.*, 704 F.Supp. 1430, 1449 (N.D.Ohio 1987), *reversed on other grounds*, 854 F.2d 131 (6th Cir.1988). Indemnification

> clauses in collective bargaining agreements which purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 73-75 (2d Cir.1982). Without such a role, public employers would have no incentive to fulfill their constitutional duties.

1990 WL 169640 at * 4.

Also, within this circuit, a district court followed *Cramer* in an action by city firefighters to prevent collection of agency fees. *Jordan v. City of Bucyrus, Ohio*, 754 F.Supp. 554 (N.D.Ohio 1991). The agreement in *Jordan* contained an indemnification clause that was similar to the one now before us. *Id.* at 555. Finding that the clause was facially neutral, the district court nevertheless found it invalid under *Cramer*. Judge Bell reasoned as follows:

> A public employer ... has duties under *Hudson* which are separate and apart from those of the union, and a union's violation of its duties thus cannot form the basis of a public employer's claim for indemnification.... *Hudson* implicitly recognizes that it is the government employer and the union who share the duty in establishing a constitutionally valid fair share procedure. The union's duty, after all, is derivative to the fact that the employer is a governmental actor. To permit a public employer to escape any duty in the implementation of the plan, would impose a governmental standard of conduct on a purely private entity.

Id. at 558.

In *Jordan* the court had previously found that the city had willfully and knowingly violated the plaintiffs' constitutional rights in implementation of the fair share agreement. Under these circumstances it would have violated public policy to permit the city to be indemnified against liability.

C.

Our consideration of the public policy question in the foregoing decisions leads to the conclusion that the district court correctly found that the indemnification agreement in the present case was repugnant to public policy, and therefore, invalid. Unlike the clause in *Stamford*, the clause in the agreement between District 925 and the university does not appear, on its face, to relieve the employer from all consequences of condoning sex discrimination, or similar civil rights violations. Thus, this clause is facially neutral. It does, however, protect the university from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*, *Tierney II* and *Lowary I* and *II*.

While there is no showing that the university willfully sought to deprive its employees of their constitutional rights, we agree with Judge Bell's statement in *Jordan* that the university as a public employer had duties separate and apart from those of the union. Both parties to a fair share agreement must be held accountable for their responsibility to see that *Hudson*'s commands are followed. A clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy.

CONCLUSION

We agree with the district court that the union's November 20 renotification cured the constitutional deficiencies in the May 3 letter to nonunion employees. This conclusion does not conflict with the decision of the panel in *Weaver I*. That panel had before it an interlocutory appeal from denial of a preliminary injunction. In such an appeal, the determinative question is whether the district court abused its discretion in denying an injunction at an early stage in the litigation. The merits of the case are not ripe for decision at that point in the proceedings.

Furthermore, in this instance the panel reviewing the preliminary injunction issue based its decision solely on the adequacy of the May 3 letter. "[W]e must examine the sufficiency of the May 3 notice, not the November 20 notice." *Weaver I*, 942 F.2d at 1042. The court indicated in dicta that the November 20 renotification was inadequate for failing to disclose financial information concerning the unions' affiliated state and national labor organizations. *Id.* The district court reached the same conclusion independently and its final judgment directed the union to disclose this information within 60 days from entry of the judgment.

In a motion to stay the judgment, the union advised the district court that it would seek a modification of that portion of the final judgment when this court decided the present appeal and the district court received our mandate. The union advised the district court that audits of all its affiliates were not available, and that in lieu of such audits the union would propose to rebate the entire portion of the agency fee attributable to affiliation charges in 1990, and not to include any affiliation charges in agency fees for 1991 and thereafter. The district court will consider this proposal upon remand.

As previously indicated, we reject the plaintiffs' contentions in their appeal from the final judgment and reject the defendants' position on the indemnification clause.

The judgment of the district court is affirmed on appeal and cross-appeal and the case is remanded for further proceedings with respect to affiliate charges. No costs allowed.

APPENDIX B

JUDGMENT IN A CIVIL CASE
ENTERED BY THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

31 May 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

CAROL WEAVER, et al

JUDGMENT IN A CIVIL CASE

v.

UNIVERSITY OF CINCINNATI, et al.

CASE NUMBER: C-1-90-591

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in plaintiff's favor on claim two and seven; and in favor of defendants on all other claims.

[File & Clerk's stamp
omitted in printing]

May 31, 1991
Date

KENNETH J. MURPHY
Clerk

/s/
(By) Deputy Clerk

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

31 May 1991

[764 F. Supp. 1241]
Carol WEAVER, et al., Plaintiffs,

v.

UNIVERSITY OF CINCINNATI, et al., Defendants.
No. C-1-90-591.

United States District Court,
S.D. Ohio, W.D.

May 31, 1991.

* * * *

[1243]ORDER

CARL B. RUBIN, District Judge.

This matter is before the Court upon cross-motions for summary judgment filed by plaintiffs Carol Weaver et al., and by defendants Joseph L. Steger and Jill Parris (the "University Defendants") and District 925/SEIU ("District 925").[1] (Doc. Nos. 32, 34, 38, 40, 41, 42). Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the Court does hereby set forth its Findings of Fact, Opinion, and Conclusions of Law.

FINDINGS OF FACT

1. The plaintiffs are, or have been, employees of the University of Cincinnati at all times relevant hereto.

2. Defendant Joseph L. Steger is the President of the University of Cincinnati, a public employer within the meaning of Ohio Revised Code Annotated § 4117.01(B). Defendant Jill

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[1] In a previous Order, this Court held that the University of Cincinnati, an arm of the State of Ohio, is immune from suit.

Parris is the interim Vice-President for Human Resources and Human Relations at the University of Cincinnati, a state institution of higher learning within the meaning of Ohio Revised Code Annotated § 4117.01(B).

3. Defendant District 925 is an unincorporated association, organized as a labor union, formed and existing under the laws of the State of Ohio.

4. The University Defendants entered into a collective bargaining agreement with District 925 effective on or about October 1, 1989 which governed the terms and conditions of plaintiffs' employment. The collective bargaining agreement contains an agency shop clause.

5. The collective bargaining agreement additionally contains a "Hold Harmless" or indemnification provision, providing that:

> The union agrees to save the University harmless from any legal action growing out of these check-off deductions that may be instituted by an employee involved therein before a court, or any other body asserting of having jurisdiction, against the University as well as reasonable costs and expenses involved in defense of any such action.

6. On May 3, 1990, District 925 mailed to all the nonmembers at its University of Cincinnati chapter, a notification describing the agency shop fee requirement negotiated as part of the collective bargaining agreement with the University of Cincinnati.

7. Thereafter, District 925 received by mail or hand delivery 157 dissents and 55 challenges from nonmember employees objecting to the agency fee requirement.

8. Beginning in June of 1990, the University of Cincinnati began deducting 90% of union dues from the paychecks of the 157 dissenters. Also, in accordance with the challenged proce-

dure, District 925 placed into an escrow account the agency shop fees deducted from the paychecks of the 55 challengers.

9. All plaintiffs in this action are challengers.

10. After the exhaustion of District 925's internal appeal procedures as provided for in the notice of May 3, 1990, an arbitration was requested and commenced under the American Arbitration Association's ("the AAA") Rules for the Impartial Determination of Agency Fees. An arbitrator was unilaterally selected by the AAA and an arbitration hearing was conducted in August of 1990.

11. The plaintiffs filed this action before the arbitration hearing occurred.

12. The arbitrator concluded that the fair share fee calculation by District 925 was proper.

13. The arbitrator did find three defects in District 925's notification procedures: (i) **[1244]**it was improper to require notification of a dissent or challenge by certified mail; (ii) it was improper for District 925 to require the exhaustion of an internal appeal procedure before challengers could exercise their right to determination before an impartial hearing officer; and (iii) the use of the word "rebate" in one of the financial statements provided by District 925 may have confused potential challengers as to the nature of the expenses itemized on that line.

14. The arbitrator ordered a re-notification of the non-members of District 925. The re-notification, dated November 20, 1990, contains the following relevant elements: (i) a full copy of an audit conducted by an independent auditor selected by District 925; (ii) an elimination of any requirement of certified mailings; and (iii) an elimination of an internal appeal procedure.

15. Under the new notification procedure, those who had filed dissents or challenges pursuant to the May 3, 1990 notice continued to be treated as dissenters or challengers for purposes of the 1990 agency shop fee charge.

16. Any nonmembers who did not file a dissent or challenge pursuant to the May 3, 1990 notice were granted a new opportunity to file a dissent or challenge under the re-notification of November 20, 1990.

17. The re-notification also provides that any nonmembers who filed challenges or dissents pursuant to the re-notification procedure, but who paid full union dues from June of 1990, are entitled to a rebate from District 925 of 10% of the dues paid since that date.

OPINION

The summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure is designed to secure a just, speedy and inexpensive determination of any action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554-55, 91 L.Ed.2d 265 (1986). Rule 56(c) permits the court to grant summary judgment as a matter of law if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" demonstrate the absence of any genuine issues of material fact. *Id.* at 323, 106 S.Ct. at 2552-53. The parties agree that no genuine issues of material fact exist as to the issues raised in this action.

I.

Claims of the Parties

Plaintiffs brought this action seeking: (i) injunctive relief against all agency shop fee seizures; (ii) complete restitution of all illegally seized fees; (iii) a declaratory judgment holding the indemnification provision contained in the collective bargaining agreement as void; and (iv) punitive damages to be assessed

against District 925. Plaintiffs challenge the collection of agency fees by the University defendants and District 925 on seven grounds. The allegedly actionable defects are: (i) plaintiffs' non-receipt of audited financial disclosure of District 925's chargeable versus non-chargeable allocations; (ii) District 925's failure to provide any financial disclosure of affiliated state and national labor organizations to whom it makes payments; (iii) District 925's procedures for objecting to or challenging the calculation of the agency fee are unconstitutionally burdensome; (iv) the definitions and methods of calculation used by District 925 are vague and constitutionally overbroad; (v) District 925 improperly charges nonmembers differing amounts of agency fees, based solely upon a percentage of the nonmembers salary; (vi) District 925 improperly charges nonmembers, who do not affirmatively dissent, 100% of union dues; and (vii) the indemnification clause contained in the collective bargaining agreement is void as against public policy.

District 925 and the University Defendants generally contest the validity of plaintiffs' claims. In addition, District 925 contends that the arbitrator's decision, coupled with its subsequent re-notification of nonmembers on November 20, 1990, effectively moot claims one through four as previously listed. Plaintiffs counter that the arbitrator's decision and the subsequent re-notification are wholly irrelevant **[1245]** to the vindication of their alleged constitutional deprivations arising from the defects in the notice of May 3, 1990. They ask this Court to adjudicate the issues before it as if the arbitration hearing and the subsequent re-notification had never occurred.

II.

Arbitration and a Constitutional Challenge to the Agency Fee Agreement

The United States Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) stated that a collective bargaining agreement containing an agency fee clause must contain a provision

providing for "a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307, 106 S.Ct. at 1076. The Supreme Court went on to clarify this requirement:

> We think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the union's unrestricted choice.... The arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action.

Id. at 308 n. 21, 106 S.Ct. at 1077 n. 21. Therefore, it is clear that an arbitrator's decision does not moot a party's § 1983 claims premised upon an allegedly unconstitutional agency fee collection procedure. The *Hudson* Court does advise that an arbitration is a legitimate first step in the evaluation of the validity of an agency fee plan. A district court may examine and ultimately ratify determinations made by a properly selected arbitrator upon a finding that an arbitrator's decision was correct.[2]

First, plaintiffs allege that District 925's procedures for objecting to and challenging the union's calculation of the fair share fee are unconstitutionally burdensome. The arbitrator correctly concluded that the notice of May 3, 1990 was constitutionally deficient in two respects: (i) the notice's requirement that a challenger exhaust the union's internal appeal process before being permitted access to an impartial decisionmaker; and (ii) the notice's certified mailing requirement to effectuate a challenge or dissent. The mandate to exhaust the union's internal appeal process clearly violates the *Hudson* requirement of prompt access to an impartial decisionmaker. *Hudson*, 475

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[2] Any contention by plaintiffs that the selection of an AAA arbitrator was unfair or biased is unfounded. The United States Court of Appeals for the Sixth Circuit explicitly held that such a selection meets the mandate of impartiality enunciated in *Hudson*. See *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir.1987).

U.S. at 307, 106 S.Ct. at 1076. Likewise, a certified mailing requirement, which serves no legitimate purpose and works to complicate and frustrate an employee's attempt to raise an objection, is invalid:

> Procedures must ... not be framed so as to discourage the exercise of First Amendment rights by intimidation or the imposition of unrealistic and excessively complex procedural requirements.

Tierney v. City of Toledo, 824 F.2d 1497, 1503 (6th Cir.1987) ("*Tierney* I"); *see also International Union, UAW v. N.L.R.B.*, 865 F.2d 791, 797 (6th Cir.1989). In light of the arbitrator's decision requiring District 925 to remedy these constitutional defects and District 925's compliance in the re-notification of November 20, 1990, the issue of burdensome objection procedures has been satisfactorily resolved.

Second, plaintiffs challenge the May 3, 1990 notice's lack of an audited financial disclosure of District 925's chargeable versus nonchargeable allocations. *Hudson* declares that a union must disclose "the major categories of expenses, as well as verification by an independent auditor." *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18. Neither *Hudson* nor its progeny mandate that a notice must include a full financial report prepared by an independent auditor. Even so, the inclusion of the independent audit in the November 20, 1990 notice affords plaintiffs the relief they request. Further action on this claim is not warranted.

[1246] Third, plaintiffs allege that District 925's failure to provide any financial disclosure of affiliated state and national labor organizations to which it makes payments is actionable as well. District 925 in the notices of May 3, 1990 and November 20, 1990 summarily set forth those amounts which were paid by the union to affiliated state and national labor organizations. Neither notice indicates how these amounts were determined by these affiliates, what funds were chargeable versus those which were nonchargeable, whether there was a verification by an

independent auditor of the calculations made by the affiliates, or exactly what constitutes District 925's group of affiliates. The arbitrator did find that the notices were not deficient despite these omissions.

The failure of District 925 to present more information concerning the union's payments to affiliated labor organizations violates the demands of *Hudson* and its progeny. In *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir.1990), the United States Court of Appeals for the Sixth Circuit commented upon the Union's disclosure duty:

> Requiring nonmembers to contribute to the cost of collective bargaining includes a substantial interference with their First Amendment right of freedom of association. Although it may be somewhat burdensome on the unions, full disclosure of financial information is a minimal requirement in exchange for this interference. *Hudson* and a due regard for First Amendment values leads to this conclusion.

Id. at 432. To fully protect nonmembers' First Amendment rights, "adequate financial disclosure 'must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement purposes.'" *Tierney v. City of Toledo*, 917 F.2d 927, 933 (6th Cir.1990) ("*Tierney* II") *quoting Tierney* I, 824 F.2d at 1503.

The summary disclosure of those payments made by District 925 to affiliated state and national labor organizations is inadequate. In both notices, District 925 failed to identify the affiliates which receive funds and failed to provide audited financial accounting of the affiliates' use of these funds. The dictates of the First Amendment and *Hudson* require such disclosures.

Fourth, plaintiffs contend that the definitions and methods of calculations used by District 925 are vague and constitutionally overbroad. Whether the definitions and calculations used

by District 925 are valid is a chargeability and not a notice issue. As stated in *Tierney* II:

> Ensuring adequate disclosure to enable a non-member to object, however, is materially different from determining whether particular expenditures are chargeable or whether the calculations and methodology therefore are acceptable.... These issues are for the Arbitrator in the first instance once a non-member has objected to the propriety of a particular agency fee.

Tierney II, 917 F.2d at 935. An arbitrator's decision on the propriety of the chargeability definitions and calculations may be given deferential treatment by a district court. *See Lowary*, 903 F.2d at 433. Absent a clear chargeability violation overlooked by an arbitrator, a district court and all parties involved would gain little by a full blown evidentiary hearing on this issue. In the present action, the arbitrator thoroughly examined the extensive financial documentation buttressing the calculations and accepted District 925's chargeability determination. In addition, the plaintiffs have failed to point to any inaccuracies in the calculations. Therefore, this Court shall defer to the arbitrator's decision on this claim.[3]

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[3] Two of plaintiffs' claims may be summarily disposed of. First, plaintiffs claim that District 925's charging of nonmembers differing amounts of agency fees based upon a percentage of the nonmember's salary constitutes a constitutional deprivation. This is a tortured attempt to equate Hudson's call for payment of a "proportionate share" by nonmembers to a payment of an "equal share" by nonmembers. The assessment of dues based upon a percentage of earnings is both reasonable and constitutional. See *Bagnall v. Airline Pilots Ass'n, Int'l*, 626 F.2d 336, 339 (4th Cir.1980).

Second, plaintiffs allege that the union erred in charging nonmembers, who do not affirmatively dissent, one hundred percent of union dues. This contention clearly overlooks a nonmember's obligation to make his objection known. *Hudson*, 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16. Because the notices of May 3, 1990 and November 20, 1990 contained sufficient information to trigger the nonmember's obligation to affirmatively object, this claim is without merit.

[1247]III.

The Indemnification Clause

Plaintiffs allege that the "Hold Harmless" provision of the collective bargaining agreement between District 925 and the University Defendants abrogates the University Defendants' duty to ensure that the agency fee collection procedure is constitutional. The collection of Union agency fees from a nonmember violates that person's First Amendment rights. This impingement is permitted so as to protect unions from the financial destruction caused by "free riders." This policy reflects a clear understanding of the contributions unions make to American workers and to American society. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 222-23, 97 S.Ct. 1782, 1792-93, 52 L.Ed.2d 261 (1977).

Because the policy of allowing unions to collect agency fees works a constitutional deprivation upon nonmembers, agency fee plans must be carefully structured and monitored by all parties involved. The United States Court of Appeals for the Sixth Circuit stated in *Tierney* I that the employer owes a duty to its nonunion employees to ensure that agency fee collection procedures do not deprive them of their rights under the First and Fourteenth Amendments. *Id.*, 824 F.2d at 1505.[4] In *Cramer v. Matish*, 924 F.2d 1057 (table) (6th Cir.1990), an unpublished decision, the Sixth Circuit Court of Appeals specifically held that indemnification clauses in collective bargaining agreements which "purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy." *Id.* at 8 *citing Stamford*

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[4] The District Court for the Central District of California summarized this position by stating: "Under Hudson, a public employer, as well as the public employees union, has a responsibility to see to it that adequate procedures are provided which minimize the impingement of nonmembers constitutional rights." *Mitchell v. Los Angeles Unified School Dist.*, 739 F.Supp. 511, 516 (C.D.Cal.1990).

Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73-5 (2d Cir.1982).

The University Defendants, through their indemnification agreement with District 925, have effectively destroyed the only realistic motivation an employer has to ensure an agency fee plan is constructed and administered correctly. By agreeing to indemnify the University Defendants for any constitutional deficiencies in their agency fee plan, District 925 enables them to escape liability for any action instituted by an employee challenging the validity of the agency fee plan.[5] The University defendants have attempted to contract away their duty to protect the First Amendment rights of the nonmember employees. This they may not do.

Nonmembers, who themselves have been forced to accept an impingement of their First Amendment rights, are entitled to the protection of a vigilant employer who is legally bound to ensure the constitutionality of an agency fee plan. The "Hold Harmless" provision of the collective bargaining agreement violates this policy concern. Accordingly, this Court finds the indemnification clause to be void as against public policy.

CONCLUSIONS OF LAW

1. The constitutional deficiencies in the notice of May 3, 1990 for dissent and challenge by nonmembers, namely the certified **[1248]**mailing requirement and the exhaustion of internal union remedies before the granting of access to an impartial decisionmaker, have been cured by the subsequent notice of November 20, 1990. *Chicago Teachers Union, Local*

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[5] The University Defendants make the argument that the availability of an Ohio Administrative remedy for employees sufficiently protects the nonmembers' rights. Such an argument completely misses the point. Protection of nonmembers' rights by a "third party" does not acquit the University Defendants of their duty to safeguard against constitutional defects in the agency fee plan.

No. 1 v. Hudson, 475 U.S. 292, 307-08 n. 21, 106 S.Ct. 1066, 1076-77 n. 21.

2. Plaintiffs' non-receipt of audited financial disclosure of District 925's chargeable versus nonchargeable allocations has been remedied by the inclusion of an independent financial audit in the notice of November 20, 1990.

3. District 925's failure to identify those affiliates to whom it makes payments, and its failure to provide audited financial disclosure of the affiliates' use of these funds, is a violation of the *Hudson* requirements. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir.1990), *Tierney* II, 917 F.2d 927 (6th Cir.1990).

4. The arbitrator correctly determined that the chargeability determination made by District 925 is valid. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433; *Tierney* II, 917 F.2d 927, 935.

5. The collection of agency fee dues by District 925 based upon a percentage of the nonmember's salary is permissible. *Bagnall v. Airline Pilots Ass'n, Int'l*, 626 F.2d 336, 339 (4th Cir.1980).

6. Nonmembers who do not affirmatively dissent from or challenge the validity of the agency fee may be charged full union dues. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 n. 16, 106 S.Ct. 1066, 1075 n. 16, 89 L.Ed.2d 232 (1986).

7. The indemnification clause contained in the collective bargaining agreement between District 925 and the University Defendants is void as against public policy. *Tierney* I, 824 F.2d 1497, 1505 (6th Cir.1987); *Mitchell v. Los Angeles Unified School Dist.*, 739 F.Supp. 511, 516 (C.D.Cal.1990).

It is hereby ORDERED that judgment is entered in plaintiffs' favor on claim two alleging inadequate disclosure

concerning payments made by District 925 to union affiliates. Accordingly, defendants are directed to disclose within 60 days of the date of this Order the identity of affiliated state and national labor organizations receiving payments from District 925 and an audited financial accounting of those payments. Judgment is also entered in plaintiffs' favor on claim seven charging the invalidity of the indemnification clause in the collective bargaining agreement between District 925 and the University Defendants. The indemnification clause is hereby stricken from the collective bargaining agreement.

It is further ORDERED that defendants' motion for judgment in their favor on all other claims brought by plaintiffs is well-taken and is hereby GRANTED.

IT IS SO ORDERED.

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

6 December 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CAROL WEAVER, ET AL.,

Plaintiffs,

v.

THE UNIVERSITY OF CINCINNATI, ET AL.,

Defendants.

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ORDER

This matter is before the Court on Defendant District 925 Service Employees International Union's Motion to Compel Answers to Deposition Questions and a Motion for Sanctions for failure to comply with reasonable discovery requests. The Court has received a memorandum from the Plaintiff (doc. 22), a Memorandum from Defendants (doc. 29) and a response from the Plaintiff (doc. 30). The filings are voluminous to say the least and may misapprehend the purpose of the inquiry in the first instance.

Defendant has filed a copy of a deposition taken of Plaintiff, Carol Weaver, on October 8, 1990. There is no doubt that Plaintiff's counsel frustrated the effort of that deposition by asserting First Amendment rights of the Plaintiff. The Court will not dispute that Plaintiff has First Amendment rights and that no inquiry may be made into matters that are otherwise privileged. The problem, however, is not a debate on First Amendment rights, but rather the question under Rule 23, Fed. R. Civ. P., that the Court must determine is whether or not "the representative parties will fairly and adequately protect the interests of the class." (Rule 23(a)(4), Fed. R. Civ. P.) This is a matter where the burden of proof is upon the Plaintiff. It does not shift to the Defendant at any time. If the Plaintiff

elects not to make information available that will assist the Court in this determination, Plaintiff may do so, but only at the expense of raising substantial questions as to such Plaintiff's ability to represent a class.

The underlying philosophy of a class action requires a court to inquire with great particularity into the allegations that a class should be certified. Large numbers of people may be affected by a decision in the case when they have neither knowledge of, nor interest, in the attitudes of this Plaintiff that may involve the outcome.

The Plaintiff herein is presented with several choices. She may assert her First Amendment rights and the Court will support that assertion. She may dismiss the class action and proceed as an individual and successfully assert the privilege. The only choice that Plaintiff does not have is to assert that she "will fairly and adequately protect the interests of the class" and deny an opportunity for the Defendant to make appropriate inquiries.

The Motion to Compel Answers to Deposition Questions and the Motion for Sanctions for Failure to Comply with Reasonable Discovery Requests are [illegible] hereby DENIED. The Motion for Class Certification is conditionally DENIED with an opportunity granted to Plaintiff to reconsider her position on the questions asked in the deposition. Upon such reconsideration and appropriate answers to the questions propounded, the Court will consider a new motion for class certification.

IT IS SO ORDERED.

/s/
Carl B. Rubin, Judge
United States District Court

APPENDIX E

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

26 August 1991

[942 F.2d 1039]

Carol WEAVER; Vicki Hahn; Sharron L. Carroll; Angela Segrist; Lois Kupferberg; and Alice Tennenbaum, Plaintiffs-Appellants,

v.

UNIVERSITY OF CINCINNATI; Joseph L. Steger; Jill Parris; and District 925, Service Employees International Union, Defendants-Appellees.

No. 90-3825.

United States Court of Appeals,
Sixth Circuit.

Argued April 2, 1991.
Decided Aug. 26, 1991.

* * * *

[1040]Before RYAN and SUHRHEINRICH, Circuit Judges, and McRAE, Senior District Judge.*

RYAN, Circuit Judge.

Plaintiffs, six nonunion public employees of the University of Cincinnati, appeal the denial of their motion for a preliminary injunction directing defendants, the University, and its collective bargaining representative, District 925 of the Service Employees International Union (the Union), to cease withholding from their pay agency shop fees on behalf of the Union. This appeal presents two issues:

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* The Honorable Robert M. McRae, Senior United States District Judge for the Western District of Tennessee, sitting by designation.

Whether plaintiffs' request for a preliminary injunction is moot because of a subsequent arbitration decision and the Union's renotification to nonmembers; and Whether the district court erred in determining that the plaintiffs failed to show irreparable injury and, as a consequence, abused its discretion in denying plaintiffs' motion for a preliminary injunction.

We conclude that plaintiffs' request for a preliminary injunction is not moot, and that the district court erred as a matter of law in holding that plaintiffs suffered no irreparable injury. We hold, further, that plaintiffs are entitled to temporary injunctive relief. Therefore, we shall reverse and remand.

I.

Plaintiffs are nonunion employees of the University who filed this civil rights action in August 1990, under 42 U.S.C. § 1983, claiming that the University and the Union had seized agency shop fees from plaintiffs in violation of the First Amendment. Contemporaneously, plaintiffs filed a motion for preliminary injunction to prevent the continued deduction of the fee under the **[1041]**terms of the collective bargaining agreement between the University and the Union. In September 1990, the district court denied plaintiffs' motion for preliminary injunction, holding only that plaintiffs had failed to show irreparable injury.

The Union represents office employees of public and private employers in several bargaining units in Ohio and other states. In October 1988, District 925 was certified to represent approximately 1,200 office employees of the University. Some members of the bargaining unit are not members of the Union. These nonmembers are required to pay an "agency fee," or "fair share fee," for collective bargaining services the Union provides to them, but they are not required to pay, as a portion of the agency fee, any amount which is attributable to the Union's partisan, political activities or to ideological purposes unrelated to collective bargaining.

The collective bargaining agreement entered into in October 1989 provided for the deduction of agency fees. On May 3, 1990, District 925 mailed to all nonmembers a notification describing the agency fee requirement negotiated as part of the collective bargaining agreement which provided that objecting nonmembers would be charged 90% of regular Union dues. The notice described the manner in which the agency fee was calculated and explained how a nonmember could "dissent" in order to qualify for the reduced agency fee. In addition, this notice described how a nonmember could "challenge" the fee, thereby obtaining the right to an arbitration hearing on whether the Union had properly determined that 90% of the agency fee was devoted exclusively to collective bargaining activities. Persons who neither dissented nor challenged the fee would automatically pay the Union's full dues through payroll deduction.

The Union received 157 "dissents" and 55 "challenges." In July 1990, the University began deducting 90% of the Union dues from the salaries of those who dissented and challenged. The Union placed in escrow the agency fees withheld from the paychecks of those who challenged. The six plaintiffs are challengers whose agency fees have been deducted from their paychecks and placed into escrow.

In November 1990, after plaintiffs filed their motion for preliminary injunction, an arbitration hearing was held, pursuant to the challenge procedure as described in the May 3 notice, for a determination of the appropriateness of the agency fee. The arbitrator found:

> As to the Union's fair share fee calculation for 1989, it must be, and is, found that with the exception of the "Professional Fees & Expenses," District 925 [of the Service Employees International Union] met its burden of establishing, with reasonable precision and detail, the constitutionally permissible bases for its chargeable expenditures.

However, the arbitrator found defects in the Union's notification procedures. In particular, the arbitrator found that: 1) it was improper to require notification of a dissent or challenge by certified mail; and 2) it was improper for the Union to use an internal appeal procedure before challengers could exercise their right to arbitration before an impartial hearing officer. The arbitrator then ordered renotification to all of the Union's nonmembers.

On November 20, 1990, District 925 mailed renotifications to all nonmembers which provided that both the requirement of certified mailings and the internal appeal procedure had been eliminated. It also included a copy of an audit conducted by the Union's independent auditor. Thereafter, any nonmembers who "dissented" in response to the renotification, but who had been paying an amount equal to full Union dues since July 1990, would receive a 10% rebate from the Union for the dues paid since July 1990. For new challengers, all of the Union dues collected would be placed in escrow.

Plaintiffs argue that defendants' agency fee collection scheme is in direct violation of the Supreme Court decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Plaintiffs claim that defendants' May 3 scheme: 1) failed to provide the **[1042]** nonunion agency fee payers with an adequate audited financial disclosure of the Union's alleged chargeable fees; 2) failed to provide any financial disclosure regarding expenditures of the affiliated state and national labor organizations that received money from the Union; and 3) required nonmembers to object using certified mail which was unreasonably burdensome. Plaintiffs also contend that their request for injunctive relief is not moot as a result of defendants' renotification because there is an ongoing concern regarding First Amendment violations. They assert that, regardless of the renotification, this court must determine the constitutionality of the May 3 notice procedure because that was the procedure in place when the district court considered and denied their motion for preliminary injunction.

In response, defendants argue that because the renotification complies with existing law, plaintiffs' appeal is moot. They also assert that notwithstanding the mootness issue, the district court did not abuse its discretion in denying plaintiffs' motion for preliminary injunction because plaintiffs have failed to demonstrate irreparable injury or a likelihood of success on the merits.

II.

A.

Mootness

Defendants argue that the arbitrator's award and the Union's renotification to nonmembers renders plaintiffs' appeal moot because defendants have now complied with the requirements of *Hudson* and the threat of irreparable injury to nonunion members has been removed. Thus, defendants assert, preliminary injunctive relief is inappropriate. Plaintiffs insist, however, that the Union's renotification does not cure the irreparable harm suffered as a result of the seizure of their funds, pursuant to the "constitutionally inadequate plan" incorporated in the collective bargaining agreement, and that despite the renotification, the agency fee scheme remains constitutionally invalid under *Hudson*.

We conclude that this case is not moot because, in determining the propriety of the district court's refusal to issue an injunction, we consider only the Union's May 3 notification, not the later renotification. As the Supreme Court stated:

> "[V]oluntary cessation of allegedly illegal conduct does not moot a case." The same concerns—the fear that a defendant would be "free to return to his old ways," and that he would have "a powerful weapon against public law enforcement,"—dictate that *we review the legality of the practice defended before the District Court*.

Hudson, 475 U.S. at 305 n. 14, 106 S.Ct. at 1075 n. 14 (citations omitted) (emphasis added). Therefore, because *Hudson* requires that we review the practice "defended before the District Court," we must examine the sufficiency of the May 3 notice, not the November 20 notice. Moreover, the renotification is constitutionally inadequate because it does not satisfy the requirements of *Hudson*. As more fully addressed below, the renotification does not disclose any financial information concerning the Union's fourteen affiliated state and national labor organizations. This is in direct violation of *Hudson*. *See* 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18.

B.

Preliminary Injunction

In its order denying the plaintiffs' motion for a preliminary injunction, the district court specifically found that "with but five plaintiffs and a small sum of money involved, neither irreparable injury has been shown nor that the interests of the public require extraordinary relief of injunction."

Plaintiffs argue that the district court erred as a matter of law in holding that plaintiffs do not suffer irreparable harm as a result of the seizure of their agency fees. They claim that in the absence of adequate notice and the procedural protections outlined in *Hudson*, they suffer irreparable First Amendment injury. They also con-**[1043]**tend that they have demonstrated a likelihood of success on the merits of their claim.

A district court's decision to deny a preliminary injunction will not be overturned absent evidence of abuse of discretion. *NAACP v. City of Mansfield*, 866 F.2d 162, 166 (6th Cir.1989). However, that rubric may be oversimple in this case because the decision whether to issue the preliminary injunction required resolution of issues of constitutional law which we review *de novo*, and of findings of fact which we review only for clear error.

The four familiar criteria the district court was required to balance are:

> "1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
>
> 2) Whether the plaintiffs have shown irreparable injury;
>
> 3) Whether the issuance of a preliminary injunction would cause substantial harm to others; [and]
>
> 4) Whether the public interest would be served by issuing a preliminary injunction."

Id. (citation omitted). The district court considered only whether the plaintiffs would suffer irreparable injury without injunctive relief, found they would not, and did not address the remaining three *Mansfield* criteria. Although we think the court erred as a matter of constitutional law in finding no irreparable harm and that its decision must be reversed on that basis alone, we shall address the other three *Mansfield* criteria as well.

Before addressing each factor, we briefly discuss the requirements of *Hudson*. *Hudson* establishes the constitutional setting in which the familiar preliminary injunction criteria must be applied in cases such as this one. Stated differently, *Hudson* provides the context in which we must test the constitutional validity of the district court's conclusion that plaintiffs have suffered no irreparable injury.

III.

Legality of Agency Fees Under *Hudson*

It is well established that a public employer may designate a union as the exclusive bargaining representative of its employees and may require nonunion employees, as a condition of employment, to pay a fair share of the union's expenses of negotiating and administering a collective bargaining agreement. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52

L.Ed.2d 261 (1977). However, nonunion employees have a First Amendment right to "'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.'" *Hudson*, 475 U.S. at 302, 106 S.Ct. at 1073 (citation omitted).[1]

Hudson establishes three procedural safeguards necessary to ensure that agency fee collection schemes are "carefully tailored to minimize the infringement" upon nonunion members' First Amendment rights. *Id.* at 303, 106 S.Ct. at 1074. First, the scheme must include a "'procedure which will avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.'" *Id.* at 305, 106 S.Ct. at 1075 (citation omitted). Second, the plan must provide nonmembers with adequate "information about the basis for the proportionate share" agency fee charged them. *Id.* at 306, 106 S.Ct. at 1075. Third, the procedure must "provide for a reasonably prompt decision by an impartial decisionmaker" when nonmem-**[1044]**bers object to the amount of the agency fee. *Id.* at 307, 106 S.Ct. at 1076.

In *Hudson*, the Supreme Court examined the procedures used by the Chicago Teachers Union to collect fair share fees from teachers who were not members of the union. The Court held that the First Amendment required that the nonunion teachers be given "sufficient information to gauge the propriety

---

[1] The Supreme Court recently enunciated "a proverbial three-part test" whereunder a bargaining unit's activities are chargeable to nonunion members if (1) they are "'germane' to collective-bargaining activity;" (2) they are "justified by the government's vital policy interest in labor peace and avoiding 'free riders;'" and (3) they do not "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert v. Ferris Faculty Ass'n*, — U.S. —, 111 S.Ct.1950, 1959, 114 L.Ed.2d 572 (1991). *Lehnert* does not alter or address *Hudson*'s procedural requirements with respect to agency fee collection schemes and, thus, does not affect the outcome of this case.

of the union's fee." *Id.* at 306, 106 S.Ct. at 1076. The Court stated that the union must identify the expenditures allocated to collective bargaining for which the nonmember teachers could be charged a fair share fee. The Court recognized, however, that "'[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18 (citations omitted). Although a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures, ... adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* Moreover, adequate disclosure would include a showing that the union's payments to its affiliated state and national labor organizations were not "used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used." *Id.*

This court has previously applied *Hudson* to cases wherein nonunion members have challenged the procedures employed by unions for collecting agency fees. In *Tierney v. Toledo*, 824 F.2d 1497, 1506 (6th Cir.1987), we found that the procedure for collecting agency shop fees from nonmembers was unconstitutional under *Hudson* because the union failed to provide detailed, audited financial information concerning all major categories of union expenses prior to the collection of the fees.

Similarly, in *Damiano v. Matish*, 830 F.2d 1363, 1370-71 (6th Cir.1987), we found the procedure used by the union to provide nonunion members with information regarding agency shop fees constitutionally inadequate under *Hudson* because 1) the information provided by the union failed to inform nonunion members of the actual amount of the fee or how the fee had been calculated; 2) the nonunion members had to specifically request the information from the union; and 3) the nonunion members were required to object to the union's expenditures before the union provided any information about the fees.

Likewise, in *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131, 134 n. 1 (6th Cir.1988), we found that once nonunion

members objected to current procedures in place for the collection of all agency fees, and once the district court found these procedures likely to be unconstitutional, it was an abuse of discretion for the court to allow fees to continue to be collected even if they were placed in an escrow account. This court enjoined the collection and escrow of all agency fees as was contrary to *Hudson*. *Id.* at 135.

Moreover, in a subsequent review of the procedures set forth in *Lowary*, we noted:

> [r]equiring nonmembers to contribute to the cost of collective bargaining involves a substantial interference with their First Amendment right of freedom of association. Although it may be somewhat burdensome on the unions, full disclosure of financial information is a minimal requirement in exchange for this interference. *Hudson* and a due regard for First Amendment values lead to this conclusion. The union must provide detailed information so that the dissenting teachers can understand why they are being charged. Only then can they make an informed decision.

Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422, 432 (6th Cir.) (footnote omitted), *cert. denied*, — U.S. —, 111 S.Ct. 385, 112 L.Ed.2d 396 (1990).

IV.

With that as a statement of the constitutional context in which we determine whether the district court abused its discretion in refusing the requested injunction, we turn to a consideration of the traditional criteria for the injunction decision.

[1045] As stated earlier, before granting a motion for preliminary injunction, a district court must consider four criteria:

> "1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;

> 2) Whether the plaintiffs have shown irreparable injury;
>
> 3) Whether the issuance of a preliminary injunction would cause substantial harm to others; [and]
>
> 4) Whether the public interest would be served by issuing a preliminary injunction."

Mansfield, 866 F.2d at 166.

Although the district court in this case recognized that it must balance these factors with "other traditional equity factors," it specifically found:

> It is entirely probable that Plaintiffs may have a limited success in that a portion of the "fair share fee" withheld may ultimately be returned to them. That, however, is not the question presented to the Court at this time.
>
> What is of great significance in the balancing that is required of a District Court is the matter of irreparability of injury. The amount involved appears to be approximately Twenty Dollars ($20.00) per Plaintiff per month. . . .
>
> * * * *
>
> A withholding of approximately One Hundred Dollars ($100.00) per month in total from five plaintiffs in an escrow account for a period of a few months does not constitute irreparable injury.

Thus, the district court confined its analysis to a consideration of the prospects for irreparable harm without balancing this factor with the other three criteria. More importantly, even with respect to the irreparable harm criterion, the district court's analysis overlooked a number of essential considerations enunciated under *Hudson* that bear, as a matter of law, upon plaintiffs' claim of irreparable injury. Because the district court's irreparable harm determination was dispositive, we address that factor first.

A.

Irreparable Injury

In order to determine whether plaintiffs have shown irreparable injury sufficient to entitle them to the requested temporary injunction, the district court was required to consider *Hudson* and its progeny. However, the court found that defendants' agency fee seizures could never constitute irreparable injury because of the amount of money involved, without any consideration whatever of *Hudson*'s requirements, despite the law of this circuit which holds that a court must issue a preliminary injunction when a union's notice or objection procedures are constitutionally deficient under *Hudson*. *See Lowary*, 854 F.2d at 134; *Damiano*, 830 F.2d at 1370; and *Tierney*, 824 F.2d at 1504. Specifically, we have mandated that the "collection of a 'fair share' service fee from the dissenting non-union members must be stayed by appropriate injunctive relief until a constitutionally adequate plan consistent with the holdings in *Abood*, *Hudson*, and this opinion is functioning." *Tierney*, 824 F.2d at 1507.

Defendants argue, and the district court agreed, that the amount of money seized from plaintiffs is such an insubstantial sum that it could not constitute irreparable injury. However, the Supreme Court has stated that "[t]he amount at stake for each individual dissenter does not diminish [the First Amendment] concern. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Hudson*, 475 U.S. at 305, 106 S.Ct. at 1075. Thus, the dollar amount in issue is irrelevant. Because *no* fees may be collected in the absence of constitutionally adequate notice and procedures, the district court erred in determining that "[a] withholding of approximately One Hundred Dollars ($100.00) per month in total from five plaintiffs in an escrow account for a period of a few months does not constitute irreparable injury."

Moreover, the Supreme Court has recognized that the placement of chal-[1046]lenged agency fees in an escrow account is not a sufficient interim remedy when there are flaws in a union's collection plan. *Hudson*, 475 U.S. at 309, 106 S.Ct. at 1077; *see also Lowary*, 854 F.2d at 134-35. In *Hudson*, the Court specifically rejected the union's argument that "because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly, it eliminates any valid constitutional objection to the procedure." 475 U.S. at 309, 106 S.Ct. at 1077.

The Union's escrow deprives plaintiffs of funds they are entitled to retain: those that relate to the Union's political or ideological causes and thus are nonchargeable expenditures. The escrow plan results, therefore, in constitutional injury.

Therefore, in light of *Hudson*, the district court erred in concluding that plaintiffs could not suffer irreparable harm by the deduction because the amount involved is the relatively small sum of approximately $100 from five plaintiffs. Moreover, the court failed to recognize that the Union's escrow procedure was not a "constitutionally adequate plan" for the collection of agency fees.

B.

Likelihood of Success on the Merits

Although the district court did not address the plaintiff's substantial likelihood of success on the merits, we think it should have and, had it done so, would have been obligated to conclude that, at the very least, the Union's procedure for the collection of agency fees from nonmembers violated *Hudson*. At a minimum, the court had to decide whether the Union's plan offered nonmembers a sufficiently detailed explanation of the major categories of the Union's expenses. Without adequate notice concerning the amounts allocated by the Union to ideological and nonideological purposes, nonunion members do not have "sufficient information to gauge the propriety of the union's fee."

It is clear that the Union's procedure for calculating and collecting agency fees, as set forth in the May 3 notice, fails to meet the *Hudson* standards in at least three respects.

First, the Union's financial disclosure fails to identify the Union's affiliates. Our decision in *Tierney v. Toledo*, 917 F.2d 927, 937 (6th Cir.1990), makes clear that "adequate financial disclosure '*must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations* that will be used for agreement and non-agreement related purposes.'" *Id.* at 937 (emphasis added) (quoting *Tierney*, 824 F.2d at 1503).

Although we note that the Supreme Court recently concluded that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates," *Lehnert v. Ferris Faculty Ass'n*, — U.S. —, 111 S.Ct. 1950, 1961, 114 L.Ed.2d 572 (1991), the local Union is nevertheless required, under *Hudson*, to delineate what portion of the agency fee goes to the Union's affiliates. A local union does not have "carte blanche to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit." *Id.*

The Union's financial disclosure, in this case, fails to provide any financial information whatsoever concerning the Union's affiliates. Because some of the agency fees paid by nonmembers could be passed on to affiliated state and national labor organizations and expended for nonchargeable activities in violation of plaintiffs' First Amendment rights, the Union's financial disclosure statement is inadequate as a matter of law.

Second, the Union's objection procedure was unconstitutionally burdensome. The Union required that a letter of dissent, challenge, or appeal to arbitration, be sent by the nonmember by certified mail. This requirement is unduly burdensome because objection procedures "must afford dissenting non-members a reasonable time to voice their objections and

must not be framed so as to discourage the exercise of their First Amendment rights by intimidation or the imposition of unrealistic and excessively complex procedural requirements." *Tier-*[1047]*ney*, 824 F.2d at 1503. In this case, a nonmember challenger may have been discouraged or intimidated by the requirement for a certified mailing, a method of mailing familiar to all in the business world but unfamiliar to some in other callings. This requirement, while indeed a minor burden, is nevertheless an unnecessary one that interferes with the ability of challengers and dissenters to merely "voice their objections."

Third, the Union's internal appeal procedure failed to meet *Hudson*'s requirement that the Union "provide for a reasonably prompt decision by an impartial decisionmaker." *Hudson* requires that the nonunion employee be entitled to "have his objections addressed in an expeditious, fair, and objective manner." 475 U.S. at 307, 106 S.Ct. at 1076.

Under the Union's notice procedure, the Union gave nonunion members the choice of sending either a letter of dissent or a letter of challenge. The letter of challenge then triggered an internal appeal procedure whereby within 30 days following the deadline for receiving challenges, the Union would hold a hearing before a three-member committee, two of whose members would be members of the Union. After the committee issued its decision, a challenger could appeal within 30 days to arbitration. Such an appeal procedure has been held to violate the rights of nonunion employees who are subject to agency fees because 1) the internal appeal process uses hearing officers employed and controlled by the Union; and 2) an objector obtains arbitration only after the Union's committee reviews his challenge. *See Hudson*, 475 U.S. at 307-08, 106 S.Ct. at 1076-77.

Therefore, because the Union's plan for the collection of agency fees from nonmembers violates the requirements of *Hudson* and, accordingly, plaintiffs' First Amendment rights are violated, we find that plaintiffs have demonstrated a substantial likelihood of success on the merits.

C.

Harm to Others

With respect to whether the requested preliminary injunction could harm third parties, the district court should have considered whether other nonunion members would be benefitted or harmed by the issuance of an injunction. Because we have found defendants' agency fee collection scheme in violation of the requirements of *Hudson*, it follows that the First Amendment rights of other nonmembers are also abridged. Thus, not only would a preliminary injunction in this case not harm others, it would *benefit* many.

D.

Public Interest

With regard to whether the public interest would be served by the issuance of a preliminary injunction, the district court should have considered whether the public interest would be served by judicial insistence upon a constitutionally valid collective bargaining agreement, if one was reached at all. Not only would such an agreement be in the public interest, it is constitutionally mandated in *Hudson*.

V.

For the foregoing reasons, we find that the district court erred in failing to consider the requirements of *Hudson* when it decided plaintiffs' motion for a preliminary injunction. Moreover, it is clear that the agency fee collection plan the plaintiffs sought to temporarily enjoin is not a "constitutionally adequate plan" under *Hudson*, and plaintiffs' entitlement to relief from the provisions of that plan is not moot.

Accordingly, we REVERSE and REMAND with directions that the district court award the plaintiffs temporary injunctive relief consistent with this opinion.

APPENDIX F

RELEVANT CONSTITUTIONAL PROVISIONS; 42 U.S.C. § 1983; FEDERAL RULES OF CIVIL PROCEDURE, RULE 23(a); AND OHIO REVISED CODE § 4117.09(C)

UNITED STATES CONSTITUTION

Article III—The Judiciary

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ****

Amendment I—Freedom Of Religion, Speech And Press; Peaceful Assemblage; Petition Of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV—Citizenship; Privileges And Immunities; Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIVIL RIGHTS ACT OF 1871

42 U.S.C. § 1983. Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ****

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23—Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

OHIO'S PUBLIC EMPLOYEES' COLLECTIVE BARGAINING LAW

Ohio Revised Code § 4117.09

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. ****

Supreme Court, U.S.
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No. 92-1072

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CAROL WEAVER, VICKI HAHN,
SHARRON L. CARROLL, ANGELA SEGRIST,
LOIS KUPFERBERG, and ALICE TENNENBAUM,
Petitioners,

v.

JOSEPH L. STEGER, President, and JILL PARRIS,
Interim Vice President for Human Resources and
Human Relations, University of Cincinnati; and
DISTRICT 925, SEIU, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF DISTRICT 925, SEIU, AFL-CIO, IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. May the District Court conditionally deny certification of a class when Plaintiffs refuse to provide, through discovery, information related to Plaintiffs' ability to properly represent the proposed class?

2. May a public employee union place the burden upon non-union members of a bargaining unit to indicate their desire to pay only those expenses chargeable under *Chicago Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986), rather than full union dues?

3. Where a court finds a procedural violation in a union's fair share collection procedures, may restitution be limited to the return of only those fees not related to the union's collective bargaining activities?

4. May a district court adopt the findings of an arbitrator as to the amount of a fair share fee upon the union's Motion for Summary Judgment, when the non-member Plaintiffs have offered no facts to contradict the arbitrator's findings?

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF DISTRICT 925, SEIU, AFL-CIO, IN OPPOSITION

STATEMENT OF THE CASE

A. Procedural History

This action arises from fair share fee deduction procedures adopted by Defendant-Respondent Local 925-Service Employees International Union (District 925) to collect a fair share fee from non-union members of its bargaining unit at the University of Cincinnati (the University) from July, 1990 to July, 1991. The Plaintiffs have petitioned for a Writ of Certiorari from a decision

of the U. S. Court of Appeals for the Sixth Circuit, dated July 23, 1992, which affirmed the District Court's grant of summary judgment on May 31, 1991. During the course of the litigation, District 925 altered its fair share fee collection procedures, primarily as the result of an arbitrator's decision and the rulings in this case. The District 925 fair share fee procedures now in use have not been challenged by the Plaintiffs.

The Complaint was filed on August 14, 1990, following notices distributed by District 925 to prospective fair share fee payors in May, 1990. On September 26, 1990, Plaintiffs moved for class certification (R. 18) under Rule 23(b)(1)(A) or (b)(2) of the Federal Rules of Civil Procedure. The six named Plaintiffs sought to represent a class comprised of themselves and "all employees of the University of Cincinnati who are represented for purposes of collective bargaining by Defendant 925 and are or were non-members of Defendant District 925 as of 3 May 1990." (R. 18). In response, District 925 noticed depositions of the six named Plaintiffs. During those depositions, District 925 sought to question the Plaintiffs on their motivations for opposing both the union and the collection of fair share fees. Yet counsel for the Plaintiffs instructed his clients not to answer such questions on grounds of an alleged "First Amendment privilege." (R. 22; Carol Weaver Deposition, pp. 12-13). As a result of these instructions to the individual Plaintiffs, District 925 was not able to discover the motivations, rationale, or objectives of the named Plaintiffs for opposing the union's fair share fee. On October 17, 1990, District 925 moved to compel answers to deposition questions (R. 22).

The District Court chose to resolve the discovery dispute by conditionally denying the Plaintiffs' Motion for Class Certification, while granting to Plaintiffs an opportunity to re-file their class motion if discovery by District 925 on the Plaintiffs' motivations was allowed (R. 35).

Rather than provide such discovery, Plaintiffs filed a notice with the District Court, stating that "they [would] not waive their First Amendment rights as a pre-condition to the Court's consideration of their Motion for Class Certification." (R. 39). As a result, Plaintiffs never renewed their Motion for Class Certification, and no class was certified.

As the federal litigation proceeded, an arbitration was conducted pursuant to the challenge procedures utilized by District 925, and under procedures administered by the American Arbitration Association (AAA). The arbitrator rendered an interim award on November 11, 1990 (R. 34, Exhibit A), which required District 925 to re-notify non-members on November 20, 1990 in a fashion which resolved several of Plaintiffs' objections to District 925's May, 1990 procedures (R. 34, Exhibit C). The new notification allowed objections by hand delivery or ordinary U. S. Mail, rather than by certified mail, and eliminated an internal hearing prior to arbitration. After transmitting the re-notification pursuant to the arbitrator's decision, District 925 moved for summary judgment on December 6, 1990 (R. 34). Plaintiffs also moved for summary judgment.

On May 31, 1991, the District Court entered a final judgment (R. 45), ruling in favor of District 925 on all but two issues: (1) The Court found that District 925 should have provided *separate* audits to fair share fee payors for *each* affiliate to which District 925 made "chargeable" payments during 1989. (Those affiliate payments represented only about 1.15% of District 925's "chargeable" expenditures in 1989); and (2) the Court found that the indemnification agreement between District 925 and the University concerning fair share fee challenges was void as against public policy. *Weaver v. University of Cincinnati*, 764 F. Supp. 1241 (S.D. Ohio 1991). Plaintiffs filed an appeal from that final judg-

ment.[1] The Sixth Circuit affirmed the District Court on July 23, 1992. 970 F.2d 1523 (6th Cir. 1992).

B. Relevant Facts and Prior Rulings

In 1990, District 925 adopted fair share fee procedures in order to comply with a variety of federal court decisions and Ohio Revised Code § 4117.09(C). Pursuant to those procedures, the accounting firm of Samuel Sindel Company ("Sindel") conducted an audit of District 925's financial records for the year ended December 31, 1989 (R. 5, Exhibit 6). Sindel then calculated the proportion of the union's 1989 expenditures believed to be properly "chargeable" to fair share fee payors, which excluded amounts attributable to partisan, political, or ideological activities. The Sindel audit report attributed ninety-one percent (91%) of District 925's expenditures for the

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[1] Plaintiffs had previously appealed an Order of the District Court denying a preliminary injunction on September 7, 1990. The District Court denied the injunction, on grounds that continued collection of fees from the six Plaintiffs would not pose irreparable harm. In a decision dated August 26, 1991, the Sixth Circuit reversed and remanded, based upon its conclusion that the "collection of a fair share service fee from the dissenting non-union members must be stayed by appropriate injunctive relief until a constitutionally adequate plan consistent with the holdings in *Abood*, *Hudson*, and this opinion is functioning." *Weaver v. University of Cincinnati*, 942 F.2d 1039 (6th Cir. 1991), *citing Tierney v. City of Toledo*, 824 F.2d 1497, 1507 (6th Cir. 1987). Subsequently, the District Court entered an injunction barring the further collection of fair share fees from the six named Plaintiffs, even though, by the fall of 1991, new and unchallenged procedures were in use by the union. The District Court also ordered the refund to the named Plaintiffs for all fees collected from them since September, 1990. As a result, the union has *fully* refunded to the named Plaintiffs all of the funds deducted from their paychecks, and has received no further agency fees from the six named Plaintiffs since the injunction was entered. No appeal was taken by either party following the District Court's entry of injunction on October 4, 1991. As a result, this Petition relates only to the District Court's May, 1991 decision on Cross-Motions for Summary Judgment, and the Sixth Circuit's July, 1992 decision affirming summary judgment.

year ended December 31, 1989, to "chargeable" activities. District 925 chose to charge a fair share fee of ninety percent (90%). (R. 5, Affidavit of Deborah Schneider.)

On May 3, 1990, District 925 mailed to approximately 400 "non-members" of its University bargaining unit a notice describing the union's fair share fee requirement (R. 5, Exhibit 3). The notice included a page of the Sindel audit report showing the major categories of union expenditures broken into chargeable and nonchargeable categories, and explained how non-members were entitled to "dissent," and thereby pay only 90% of union dues, representing the costs of collective bargaining, less any political or ideological activities of the union, or "challenge" the fair share fee through an arbitration hearing on whether or not District 925 had properly calculated its 90% fair share fee. *Id.* Individuals who neither dissented nor challenged were told that District 925's full dues would be deducted from their paychecks.

District 925 received by mail or hand delivery 157 "dissents" and 55 "challenges" from University employees (R. 5, Affidavit of Deborah Schneider). In July of 1990, the University began deducting 90% of union dues from the paychecks of the dissenters and challengers. One hundred percent (100%) of dues was deducted from the remaining non-members.

An arbitration was conducted under the AAA Rules for the Impartial Determination of Agency Fees in August, 1990 before Arbitrator Phyllis Florman (R. 5, Exhibits 4, 5) who rendered an interim award on November 11, 1990 (R. 34, Exhibit A). With respect to the *amount* of the fee, the arbitrator found that

> [a]s to the union's fair share fee calculation for 1989, it must be, and is, found that with the exception of the "Profesisonal Fees and Expenses," 925/SEIU met its burden of establishing, with reasonable precision and detail the constitutionally permissible bases for its chargeable expenditures.

Id. The arbitrator asked for additional information from District 925 on its charges for "Professional Fees and Expenses," which information was provided.

However, the arbitrator found three defects in District 925's notification *procedures.* Specifically, she found (1) that it was improper to require notification of a "dissent" or "challenge" by certified mail; (2) that it was improper for District 925 to use an internal appeal procedure before challengers could exercise their right to AAA arbitration; and (3) that the use of the word "rebate" in one entry of the financial statement may have confused potential challengers. *Id.*

As a remedy, the arbitrator ordered a re-notification of the District 925 non-members using proper procedures. *Id.* District 925 transmitted a new notice to all fair share fee payors on November 20, 1990 (R. 34, Exhibit C), which eliminated the internal hearing and certified mail requirement, and included the union's entire 1989 audit. *Id.* All non-members who had not previously "dissented" or "challenged" could do so with the right to a rebate of 10% of dues previously collected. Only a handful of additional "dissents" and "challenges" were received.

District 925 sent a new annual notification to non-members (the "1991 Procedures") on June 8, 1991 (R. 58, Affidavit of Deborah Schneider and Exhibit A), which satisfied Arbitrator Florman's requirements and the District Court's subsequent May 31, 1991 decision granting summary judgment.

On July 23, 1992, the Sixth Circuit affirmed the District Court's grant of summary judgment. The Sixth Circuit's holdings can be summarized as follows:

1. *Class certification*: The Court found that the District Court did not abuse its discretion in conditionally denying class certification:

> Because the named Plaintiffs refused to reveal their reasons for declining to join the union or for bringing this action, there simply was not any information before the Court regarding the Plaintiffs' motivations for instituting this proceeding. On the other hand, the District Court did have some indication that the named Plaintiffs' interests could be divergent from those of other members of the proposed class. Furthermore, the District Court denied the motion for certification conditionally, and indicated that it would reconsider upon a showing by the Plaintiffs that they meet Rule 23's requirement to serve as class representatives. We find no abuse of discretion in the District Court's ruling.

970 F.2d at 1531.

2. *The payment of 100% dues by non-dissenting non-members*: The Court found that once the union had provided an adequate notification to non-members on November 20, 1990, the union was entitled to require non-members to either "dissent" or "challenge," thereby obtaining an immediate 10% reduction from standard union dues. Without an objection, the non-member could be required to pay 100% of union dues. Relying upon this Court's decision in *Hudson*, and the Ninth Circuit's recent decision in *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258 (9th Cir.), *cert. denied*, 113 S.Ct. 375 (1992), the Court stated:

> . . . the Plaintiffs' argument must fall because it seeks to shift the balance of interest underlying all of the Supreme Court's pronouncements on the subject of agency shop fees. An "opt-in" procedure would greatly burden unions while offering only a modicum of control to non-union employees whose procedural rights have already been safeguarded by *Hudson*.

970 F.2d at 1533.

3. *The financial remedy available*: The Court rejected Plaintiffs' argument that the individual Plaintiffs, along

with other non-members, were entitled to a full refund of *all* fees collected under the union's procedure before it was corrected, relying upon *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433 (6th Cir. 1990) (*Lowary II*), and this Court's decision in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963). In *Lowary II*, the Sixth Circuit declined to award a remedy in the form of a 100% rebate of fair share fees, even though the union's fair share fee procedures were found to be defective, stating, "To allow Plaintiffs to recover for both chargeable and non-chargeable expenditures would constitute a windfall to Plaintiffs." 903 F.2d at 433. The Court concluded:

> In the absence of willful or malicious constitutional violations of *Hudson's* procedures, punitive damages in the form of a full refund of chargeable fees are unwarranted.

907 F.2d at 1534.[2]

REASONS FOR DENYING THE WRIT

The Petition should be denied because this case presents a collection of procedural and previously decided issues which hardly require review or reconsideration by this Court.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONDITIONALLY DENYING CLASS CERTIFICATION IN LIGHT OF PLAINTIFFS' REFUSAL TO COOPERATE IN REASONABLE CLASS DISCOVERY

The District Court's *conditional* denial of class certification was simply an attempt to resolve a discovery

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[2] The Sixth Circuit also found in its July 23, 1992 opinion that the District Court properly set aside the indemnification language in the Collective Bargaining Agreement between the union and the University, and that the AAA's fair share fee procedures can properly be used to impartially determine objectives concerning agency fee calculations and procedures under *Hudson*. No party seeks review by this Court of those holdings.

dispute arising from Plaitiffs' counsel's over-zealous deposition practice. As a result, this case does not present the broad class representation issues which Plaintiffs assert in their Petition.

In seeking class certification, Plaintiffs have the burden of satisfying each of the requirements of Rule 23, Fed. R. Civ. Pro. *See, e.g., Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977). *See also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). One prerequisite for class certification under Rule 23(a)(4) is that the representative parties must "fairly and adequately protect the interests of the class." As this Court has found, "a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

This Court's decisions on agency fee issues arising under the Railway Labor Act raise serious doubts about the propriety of any class action on behalf of non-union members objecting to union agency fees:

> This is not and cannot be a class action. . . . "The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities."

Brotherhood of Ry. and S.S. Clerks v. Allen, 373 U.S. 113, 119 (1963), *citing International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

Defendants confronting a request for class certification are entitled to take discovery on each of the elements set forth in Rule 23(a), including the ability of the representative parties to "fairly and adequately protect the interests of the class." In *Eggleston v. Chicago Journey-*

men Plumbers' Local Union 130, 657 F.2d 890, 895 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982), the Seventh Circuit recognized that in a class action "some degree of discovery may be appropriate in certain cases to aid making the necessary class determinations." In *Eggleston*, the court recognized the need for discovery on the issue of whether or not "the named parties are qualified and capable of fully pursuing the common goals of the class without collusion or conflicts of interest." *Id.* at 896.

In deposing the named Plaintiffs, District 925 attempted to determine whether the named Plaintiffs would "fairly and adequately protect the interests of the class" they sought to represent—non-members of District 925 at the University. Generally, a representative may be adequate if his interests are not antagonistic to those of other class members. *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976). Initial questions of the adequacy of representation were raised by the Plaintiffs' Complaint, which sought broad and punitive relief from the union, including an Order barring the collection of *any* fair share fee, restitution of all fees collected and punitive damages (R. 1, pp. 22-25). Such relief could have crippled District 925's ability to represent all members of the bargaining unit, including non-union "free riders" who hoped to benefit from some aspects of union representation. In addition, some of the named Plaintiffs had participated in efforts to oppose organization of the union since its inception, publishing an anti-union newsletter, *The Onion*. While the financial destruction of the union might have been consistent with the goals of these individual Plaintiffs, those goals would not necessarily have been consistent with those of hundreds of non-members content to pay either 100% or 90% of union dues, while enjoying the wages, benefits and rights negotiated by the union.

The Seventh Circuit's decision in *Gilpin v. American Federation of State, County, and Municipal Employees*,

AFL-CIO, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989), also suggests that the interests of Plaintiffs represented by counsel employed by the National Right-To-Work Legal Defense Foundation, Inc. could well be antagonistic to the interests of other union nonmembers. In *Gilpin*, the Seventh Circuit upheld the rejection of class certification in a comparable case, finding that the potential for conflicts within a proposed class of non-union employees precluded the named Plaintiffs from adequately representing the entire class of non-union employees:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay anymore for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the unions; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right To Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee.

875 F.2d at 1313. The U.S. District Court for the District of Columbia denied class certification for similar reasons in *Abrams v. Communications Workers of America*, 132 LRRM 2910, 2912 (D. D.C. 1989).[3]

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[3] In their brief before the Sixth Circuit, counsel for the Plaintiffs attempted a rhetorical "mugging" of the author of the *Gilpin* decision, Judge Posner, characterizing that opinion as "a diatribe, not a model of disciplined legal reasoning," and accusing its author of being "confused over the parties or case before the Court." Plaintiffs also argued that "*Gilpin* is intemperate to the point of exhibiting a judicial bias at war with even the most primitive understanding of due process." (Pl. Sixth Circuit Brief, p. 24, fn. 18). Significantly, the Sixth Circuit disregarded this assault upon

More recently, the *Gilpin* decision was followed by the Fourth Circuit in *Kidwell v. Transp. and Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1760 (1992). The Fourth Circuit upheld a district court denial of class certification, noting in part that "the plaintiffs, once again represented by the National Right-To-Work Legal Defense Foundation, are not adequate representatives under Rule 23." 946 F.2d at 306. Those holdings are consistent with decisions of other Circuits allowing the denial of class certification where class representatives had interests or objectives conflicting with those of some proposed class members.[4] Petitioners cite no conflicting rulings on class issues in agency fee litigation from any other Circuit.

In light of the Seventh Circuit's opinion in *Gilpin*, counsel for District 925 reasonably sought discovery from the six Plaintiffs concerning their motivations and biases with respect to the union. Those questions were neither intrusive nor overly broad, but simply sought the basis for the Plaintiffs' motivation in bringing the lawsuit

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the reasoning in *Gilpin*, relying upon it in affirming the District Court's decision. (Sl. Op., p. 14).

[4] *See e.g., United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1284 (7th Cir. 1985) (denying class certification because some class members opposed benefit changes for which plaintiffs sued); *Peterson v. Oklahoma City Housing Auth.*, 545 F.2d 1270 (10th Cir. 1976) (some tenants support security deposit, so class of tenants in action opposing deposit inappropriate); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972) (some utility customers likely to oppose additional expense of imposing hearing requirement for service termination, so class certification inappropriate); *Carroll v. American Fed'n of Musicians*, 372 F.2d 155 (2d Cir.), *cert. denied*, 389 U.S. 817 (1967), *aff'd on this point, rev'd on other grounds*, 391 U.S. 99 (1968) (class certification denied in action by orchestra leaders challenging union control of industry where evidence shows many orchestra leaders subscribe to union's policies); *see also Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) (certification denied due to potential conflict over plaintiffs' challenge of an early retirement program).

against District 925 and the University. In response, Plaintiffs refused to disclose their motivations or attitudes toward the union, citing a so-called "First Amendment privilege." This tactic denied District 925 the opportunity to determine whether the named Plaintiffs were "hostile to unions on political or ideological grounds," which formed the basis for denial of class certification in *Gilpin*.

In response to District 925's Motion to Compel Discovery, filed pursuant to Rule 37(a)(2), Fed. R. Civ. Pro., the District Court sought to craft a compromise. Rather than compelling discovery, the District Court presented Plaintiffs with an option: either answer the questions or face the denial of class certification. This course of action by the District Court was not an abuse of discretion. Instead, it was a reasonable exercise by the District Court of the discretion allowed under Rule 23 (class certification) and under Rule 37 (sanctions for discovery abuse), Fed. R. Civ. Pro.[5]

This case does not present, as Petitioners contend, the issue of whether or not Plaintiffs represented by counsel employed by the National Right-To-Work Legal Defense Foundation, Inc., can fairly and adequately represent a class of non-union members. Because of Petitioners' refusal to engage in reasonable discovery, the District Court was never required to rule on that issue. Nor does this Court have before it a record which could allow it to review that issue.

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[5] District Court rulings on discovery motions and class certification issues are subject to reversal only upon a showing of abuse of discretion. A "district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, should not be overturned absent a showing of abuse of discretion." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988). Likewise, "the scope of discovery is within the sound discretion of the trial court." *Chrsyler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981).

II. ONCE A FULL *HUDSON* DISCLOSURE OCCURS, A UNION'S FAIR SHARE FEE PROCEDURES MAY FAIRLY PLACE THE BURDEN UPON NON-MEMBERS TO EXPRESS THE DESIRE TO PAY LESS THAN FULL UNION DUES

Plaintiffs argue that even where a union has satisfied the disclosure obligations set forth in *Hudson*, non-union members may not be required to object to the payment of 100% of union dues.

District 925's procedures include a full disclosure of the basis for the fair share fee calculation. The union then requires the non-member to respond by hand delivery or ordinary mail with a "dissent" or "challenge" to obtain a reduction of the payroll deduction to 90% of union dues. Non-members who neither "dissent" nor "challenge" must pay 100% of union dues. Contrary to the arguments of the Plaintiffs, such a procedure satisfies the standards set forth by this Court in *Hudson* and by every court which has considered this issue. In *Hudson*, this Court set forth a framework of procedures for the protection of the constitutional rights of non-union members required to pay agency fees. Those procedural safeguards were required specifically "because the non-union employee has the burden of raising an objection." 475 U.S. at 306. As stated by the Sixth Circuit in this case, "it follows that if employees did not bear the burden of objection, many of *Hudson's* procedural safeguards would be less restrictive on the union's collection activity." 970 F.2d at 1532.

This Court's decisions arising under the Railway Labor Act first established the proposition that non-union members wishing to pay less than full union dues have the burden of informing the union of their desire to pay only those expenses related to collective bargaining. *See, e.g., Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 238 (1956); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 744 (1961); and *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963). As an example, in *Street*, the Court found that:

> Any remedies, however, would properly be granted *only to employees who have made known to the union officials that they do not desire their funds to be used for political causes* to which they object . . . [*D*]*issent is not to be presumed—it must affirmatively be made known to the union* by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subject to sanctions in favor of an employee who makes no complaint of the use of his money for such activities. (Emphasis added).

367 U.S. at 744.

In *Hudson*, this Court applied that doctrine to public employees, establishing a notification and disclosure requirement that would allow affected non-members to exercise their right to dissent only after receiving reliable information on the union's expenditures. This Court held:

> . . . that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

However, so long as the union provides such an explanation and opportunity for challenge, "[T]he nonmember's 'burden' is simply the obligation to make his objection known." 475 U.S. at 306, n. 16.

The Sixth Circuit's earlier decision in *Damiano v. Matish*, 830 F.2d 1363, 1369, n. 8 (6th Cir. 1987) followed *Hudson* in finding that "the burden is on the individual employee to object to expenditures by the union for political or ideological purposes. . ." More recently, the Ninth Circuit in *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258 (9th Cir.), *cert. denied*, 113 S.Ct. 375 (1992), also rejected the identical argument made by the Petitioners in this case:

> The Supreme Court has never suggested that employees who are offered the opportunity to object to the union fee deduction and do not do so, act under any compulsion. There is thus no basis, either factual or legal, for the district court's conclusion that plaintiffs were "compelled" to acquiesce, in violation of their First Amendment rights.

963 F.2d at 262. Plaintiffs have cited no other Courts of Appeals decisions to the contrary on this issue.

This Court's fair share fee decisions establish a procedural framework designed to balance the interests of unions and non-members with respect to the collection of fair share fees. The *Hudson* procedures, with their requirement of disclosure, objection, and an impartial hearing to resolve challenges, fairly allocate the burdens placed on unions and non-members in resolving agency fee disputes. District 925's procedures now comply with *Hudson* and need not be reviewed by this Court.

III. A DISTRICT COURT NEED NOT REQUIRE THE FULL RESTITUTION OF ALL FAIR SHARE FEES COLLECTED UNDER PROCEDURES NOT FULLY SATISFYING *HUDSON*

The six Plaintiffs have already received a *full* refund. The District Court's injunction remains in effect even though District 925's procedures now satisfy the *Hudson* requirements. Yet Plaintiffs complain that they were unfairly denied relief "in the form of a complete refund of the Petitioners' property." Even though no class was certified, Plaintiffs claim that the remedy awarded should have been "the irrevocable return of all fees seized *from all class members* prior to complete compliance." (Petition, p. 22, emphasis added).

This Court's earlier decisions arising under the Railway Labor Act approved remedies which extended only to fees used for "non-chargeable", political or ideological activities. In *International Ass'n. of Machinists v. Street*, 367 U.S. 740, 775 (1961), the Court described an appropriate retrospective remedy:

> The portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.

367 U.S. at 775.

Likewise, in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122-24 (1963), the court approved a remedy which:

> . . . would order (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion.

In *Hudson*, the Court reiterated the right of a union, through collective bargaining, "to require non-union employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective bargaining agreement." 475 U. S. at 301. The remedy sought by Plaintiffs would undeniably deny the union that "fair share."

The Sixth Circuit properly concluded that the remedy sought by the Plaintiffs far exceeded the scope of appropriate remedies previously approved by this Court:

> In the absence of willful or malicious constitutional violations of *Hudson's* procedures, punitive damages in the form of a full refund of chargeable fees are unwarranted.

970 F. 2d at 1534, *citing Lowary II*, 903 F. 2d at 433. Any broader remedy would unduly penalize the union while allowing dissenters to avoid their legitimate obligation to share the costs of collective bargaining. Significantly, Plaintiffs cite no other decision of any federal court of appeals which supports their argument for a remedy of restitution exceeding the non-chargeable portion of any improperly collected fair share fee.[6]

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[6] Plaintiffs urge that there is a conflict between those Sixth Circuit decisions enjoining the collection of *future* fees until a

IV. ABSENT CONTRADICTING PROOF, THE DISTRICT COURT WAS ENTITLED TO RELY UPON THE ARBITRATOR'S CONFIRMATION OF THE UNION'S FAIR SHARE FEE CALCULATION IN GRANTING SUMMARY JUDGMENT

Arbitrator Florman, selected under the AAA's procedures for the calculation of union fees, affirmed District 925's May, 1990 fair share fee calculation. That arbitration decision was offered with District 925's Motion for Summary Judgment. In response, Plaintiffs failed to establish that questions of fact existed as to the propriety of the fair share fee calculation. In response to the cross-motions for summary judgment filed by the parties, the District Court ruled, in part, as follows:

> 4. The arbitrator correctly determined that the chargeability determination made by District 925 is valid. *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433; *Tierney v. City of Toledo*, 917 F.2d 927, 935 (6th Cir. 1990).

However, the District Court acknowledged that its role exceeded simply "rubber stamping" the arbitrator's determination:

> The *Hudson* court does advise that an arbitration is a legitimate first step in the evaluation of the

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lawful procedure is adopted. *See, e.g., Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir. 1988) (*Lowary I*), with those cases, including this one, in which the Court has found that a remedy of restitution should include only those improperly collected fees which were not utilized for purposes of collective bargaining. *See, e.g., Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422 (6th Cir. 1990) (*Lowary II*). In fact, the Sixth Circuit's opinions fairly distinguish between what it characterizes as an obligation by a court to enjoin an ongoing First Amendment violation, as opposed to the court's obligation, once the violation has been corrected, to craft a retrospective remedy which does not deny to the union those funds which could have been properly charged. *See, e.g., Weaver II*, 970 F.2d at 1533-34. This approach fairly balances the interests of non-members to a constitutional fair share fee procedure, while likewise protecting the union's right to be fairly compensated for its efforts related to collective bargaining.

> validity of an agency fee plan. A district court may examine and ultimately ratify determinations made by a properly selected arbitrator upon a finding that an arbitrator's decision was correct.

764 F. Supp. at 1245.

Before this Court, Plainitffs now argue that the District Court improperly treated "Petitioners' claim for damages as effectively precluded by an unappealed decision issued by an individual acting at the sole behest of a constitutional tortfeasor. . . ." (Petition, p. 28). In fact, once District 925 had moved for summary judgment under Rule 56, Fed. R. Civ. Pro., and had supported that motion with an affidavit identifying the arbitrator's decision, the burden then shifted to the Plaintiffs to contest the arbitrator's findings as to the propriety of the fee with *facts*. Under Rule 56(e):

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

In this case, Plaintiffs never contested with facts the arbitrator's determination that the 90% fair share fee had been properly calculated by the union. As a result, the District Court did not err in granting summary judgment based upon the unchallenged findings of the arbitrator. Petitioners' legal arguments cannot conceal their own failure to include in the record facts sufficient to create questions of fact as to the arbitrator's decision which would have prevented summary judgment.

Regardless, broad precedent supports a district court's reliance upon an arbitrator's determination, particularly in the absence of facts offered to contest the arbitrator's

findings. In *Hudson*, the Court endorsed the use of arbitration in resolving questions about the calculation of fair share fees:

> Indeed, we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decision maker, so long as the arbitrator's selection did not represent the union's unrestricted choice.

475 U. S. at 308, n. 21. Under the AAA Rules utilized by District 925, the arbitrator is unilaterally selected by AAA once District 925 requests arbitration as to its fee.

The Sixth Circuit had previously upheld the use of the AAA procedures, in *Damiano v. Matish*, 830 F.2d at 1372:

> Because the procedure adopted by the Union in this case would provide an opportunity for the participants to challenge the selection of a particular arbitrator for identifiable bias, and because the selection of the arbitrator would not be left solely to the discretion of the Union, this part of the Union's amended policy appears to meet the procedural requirements set forth in *Hudson*.

Other federal courts of appeals decisions acknowledge that an arbitrator's opinion may be treated as presumptively valid unless disputed with specific facts by nonmembers. *See, e.g., Tierney v. City of Toledo*, 917 F.2d 927, 935 (6th Cir. 1990) (*Tierney III*); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433 (6th Cir. 1990) (*Lowary II*); and *Kidwell v. Transp. Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1991).

The record shows that the District Court properly weighed the unrebutted findings of the arbitrator before granting summary judgment in favor of District 925 as to the amount of the agency fee. Petitioners are not entitled to a reversal of that finding, since they failed to offer any facts in response to District 925's Motion for Summary Judgment to dispute the arbitrator's findings.

CONCLUSION

The Petition should be *denied, since this case does not* present a compelling or important question of grave public concern, and does not present issues regarding which there is a conflict among the Courts of Appeals:

1. The class certification issues arise only from the District Court's reasonable exercise of discretion under Rule 23 or Rule 37, Fed. R. Civ. Pro.;

2. The union's requirement that non-members must object in order to pay less than full union dues was contemplated by this Court in *Hudson;*

3. The broad remedy of 100% restitution sought by Plaintiffs is contrary to this Court's rulings in *Street* and *Allen* and would deny the union its "fair share."

4. The District Court could properly review and accept the arbitrator's findings in the absence of contesting facts from Plaintiffs.

For these reasons, the Petition should be denied.

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No. 92-1072

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CAROL WEAVER, VICKI HAHN, SHARRON L. CARROLL, ANGELA SEGRIST, LOIS KUPFERBERG, and ALICE TENNENBAUM,
Petitioners,

v.

JOSEPH L. STEGER, President, and JILL PARRIS, Interim Vice-President for Human Resources and Human Relations, University of Cincinnati; and DISTRICT 925, SEIU, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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February 1993

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ARGUMENT

I. DISTRICT 925 REWRITES THE COURT OF APPEALS' DECISION, WHILE IGNORING CONFLICTING VIEWS ON COGNIZABLE CLASS CONFLICTS.

District 925, SEIU, AFL-CIO's ("District 925") Brief in Opposition ("Opp.") is more significant for its omissions than its substance. Restating the district court's narrow reason for denying class certification (because "Plaintiffs refuse[d] to provide ... information related to Plaintiffs' ability to properly represent the proposed class," Opp. at i), District 925 ignores the broader principle guiding the Sixth Circuit's affirmance.[1]

The Sixth Circuit affirmed because it found that Petitioners' "choice of remedy is arguably antagonistic to the wishes of other employees." Pet., App. A at 14a. However, no **record evidence** even remotely suggests that absent class members do not want the relief sought by Petitioners.[2] To the contrary, the only

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[1] District 925 frivolously asserts that "this Court [does not] have before it a record which could allow it to review [the class certification] issue." Opp. at 13. The Sixth Circuit certainly had a sufficient record to reach a decision. Petition for a Writ of Certiorari ("Pet."), Appendix ("App.") A at 12a-15a. Likewise, the union curiously inveighs against Petitioners' invocation of their "alleged" or "so-called 'First Amendment privilege,'" Opp. at 2, 13, as "Plaintiffs' [sic] counsel's over-zealous deposition practice," *id.* at 8-9, and as a "tactic," *id.* at 13, neglecting to mention that the district court upheld Petitioners' First-Amendment privilege, Pet., App. D at 45a-46a, denying District 925's Motion to Compel and Motion for Sanctions. R. 22.

[2] Likewise, most cases cited by District 925 as consistent with the court of appeals' ruling, Opp. at 12 n.4, support Petitioners. In three, certification was denied because there was **evidence** that class members had conflicts relating to the subject matter of the suit with the named representatives. *United Indep. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1274, 1284 (7th Cir. 1985); *Peterson v. Oklahoma City Housing Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976); *Carroll v. American Fed'n of Musicians*, 372 F.2d 155, 162 (2d Cir. 1967), *aff'd on this point, rev'd on other grounds*, 391 U.S. 99, 103 n.4 (1968).

(continued...)

evidence of the practices and wishes of absent class members—"potential objectors," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986)—shows that not a single nonmember ever voluntarily contributed even a dime to District 925. R. 26, Ex. B at 3, Answer to Interrogatory 2. Of course, even Petitioners' complete success would not prevent anyone from contributing to District 925 in the future, if they choose to.

Thus, District 925 fails to address the first Question Presented, Pet. at i, *ipso facto* conceding that the Sixth Circuit affirmed the denial of class certification based upon its "sheer speculation," *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46 (1990), about "the wishes of other" class members. Pet., App. A at 14a. District 925 thus ignores well-established principles regarding class actions,[3] and overlooks those six circuits which have held that even real evidence that absent class members do not want remediation and vindication of their rights does not create judicially cognizable class conflicts. *See* Pet. at 13-14.

District 925 also evades the Question Presented by redefin-

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[2](...continued)
In a fourth, *Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972), the class was denied as unnecessary. The court cited possible conflicts as an additional justification, speculating regarding the consequences of success by the class representatives. In *Phillips v. Klassen*, 502 F.2d 362, 367 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974), the court determined that where the challenged action "may be taken as conferring economic benefits or working economic harm, depending on the circumstances of the individual, the foundations of maintenance of a class action are undermined." Here, no such danger appears, since all nonmembers suffer economic harm by reason of fee seizures to which they would not otherwise be subjected.

[3] District 925's claim that "Petitioners cite no conflicting rulings on class issues in agency fee litigation from any other Circuit," Opp. at 12, simply ignores Petitioners' Brief at 14 (referencing Pet. at 8 n.6), citing most of the reported cases certifying identical classes. *See* n.4, *infra*.

ing the class sought. Curious is the union's argument that Railway Labor Act jurisprudence casts "serious doubts about the propriety of any class action on behalf of non-union members objecting to union agency fees," Opp. at 9, citing *Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963), and *Machinists v. Street*, 367 U.S. 740, 774 (1961), since the courts below did not rely upon *Allen* and *Street* to deny certification. This is probably because those cases involved an entirely different cause of action. That is, in *Allen*, 373 U.S. at 119, and *Street*, 367 U.S. at 774, only objecting employees subject to a union- or agency-shop agreement had a substantive right not to subsidize their bargaining agent's political and ideological activities. Here, on the other hand, all "potential objectors"—i.e., all nonmembers—are entitled to "sufficient information to gauge the propriety of the union's fee," *Hudson*, 475 U.S. at 306, and to have available the other procedural safeguards that are "the constitutional requirements for the Union's collection of agency fees," *id.* at 310. *See George v. Baltimore City Public Schools*, 117 F.R.D. 368, 371-72 (D. Md. 1987) (distinguishing *Allen* from a case such as this).[4]

Stripped to its essence, District 925's Opposition relies solely upon *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989), and derivatively, *Kidwell v. Transportation Communications International Union*, 946 F.2d 283, 306 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992), decisions which were wrong. Those decisions misstate critical facts by suggesting that nonunion employees who receive free legal aid provided by the National Right to Work Legal Defense

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[4] The class is defined as "employees of the University of Cincinnati within the relevant bargaining unit: (1) who are represented exclusively for purposes of collective bargaining by ... District 925 and (2) who are nonmembers of ... District 925, or were nonmembers on 3 May 1990." R. 1 at 6, ¶ 12. Similar classes were certified in *George*, 117 F.R.D. at 371-72; *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F. Supp. 938, 944 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258, 262 (9th Cir.), *cert. denied*, 113 S. Ct. 375 (1992); *Hohe v. Casey*, 128 F.R.D. 68, 72 (M.D. Pa. 1989); and *Damiano v. Matish*, 644 F. Supp. 1058, 1060 (W.D. Mich. 1986), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987).

Foundation, Inc., and its staff attorneys are *per se* inadequate class representatives under Fed. R. Civ. P. 23. These cases both rely upon sheer speculation about: (1) wishes of absent class members; and (2) consequences of an award of the relief sought. Since *Gilpin* and *Kidwell* are rooted in "sheer speculation," *McKesson Corp.*, 496 U.S. at 46, they conflict with this Court's standards regarding the usual and accepted bases for judicial decisionmaking. Likewise, District 925 cites no facts or evidence supporting the Sixth Circuit's economically anti-rational theory that some nonmembers do not want their unlawfully seized property returned to them. That theory, too, is "sheer speculation."

II. DISTRICT 925 REWRITES FIRST-AMENDMENT LAW BY SUGGESTING THAT INFRINGEMENTS ARE NOT MEASURED AGAINST THE "LEAST-RESTRICTIVE MEANS" TEST WHEN THEY BENEFIT UNIONS.

Most striking is District 925's failure to identify even a single compelling state interest served by the state's seizure (by definition, absent consent) of the nonmembers' money for union political activities. Like the court of appeals, Pet., App. A at 15a-19a, the union fails to explain how such a practice meets First-Amendment scrutiny. Indeed, reference to the First Amendment appears only in the body of a quote from a Ninth Circuit decision. Opp. at 16, quoting *Mitchell*, 963 F.2d at 262.

Instead, the union relies upon this Court's decisions in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), *Street*, and *Allen*. Opp. at 14-15. District 925's reliance is misplaced. Those cases did not address the narrow question regarding **nonmembers**—all "potential objectors," *Hudson*, 475 U.S. at 306—presented here. Unlike Petitioners, employees in *Hanson*, *Street*, and *Allen* did not challenge the requirement that they object to the union's political, ideological, or other nonbargaining spending to avoid paying for those activities. *E.g.*, Brief for Respondents at 6-7, *Allen*, *supra* (No. [62-] 316).

District 925's Opposition illustrates why those decisions are

inapplicable. While claiming that *Street* "first established the proposition that **non-union members** wishing to pay less than full union dues have the burden of informing the union of their desire to pay only those expenses related to collective bargaining," Opp. at 14 (emphasis added), the union then quotes this Court's actual holding that remedies are available only to "**employees** who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Street*, 367 U.S. at 744 (emphasis added), *quoted at* Opp. at 15. **Three times** in that same passage this Court uses the word "employee," not the more specific word "nonmember." Use of the more general term was necessary because *Street*, 367 U.S. at 742, involved a "union-shop agreement," not an agency shop. Thus, District 925 and the Sixth Circuit are mistaken when they assert that those cases impose an initial "objection" requirement on **nonmembers** to prevent the seizure of admittedly nonchargeable amounts. *Id.* at 14.

Likewise, plaintiffs in prior cases had made their objections known to the unions. *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1956 (1991); *Hudson*, 475 U.S. at 297; *Ellis v. Railway Clerks*, 466 U.S. 435, 439 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-14 (1977); *Allen*, 373 U.S. at 118-19 & n.6; *Street*, 367 U.S. at 744. Thus, this critical issue has not been directly or indirectly decided by this Court.

Similarly, reliance upon *Hudson*'s comments regarding "objection," Opp. at 15, is misplaced. In *Hudson*, 475 U.S. at 306, "objection" is necessary to invoke the process to challenge the union's calculation of the fee, not to prevent the seizure of full union dues. Thus, this Court held that "the nonunion employee has the burden of raising an objection, but ... the union retains the burden of proof," *id.*, not unreasonably requiring that individuals act to invoke adjudicative procedures.

Further, this Court could not have been discussing "objection" in the context at issue here, because the union in *Hudson* could not exact an amount equal to full union dues from nonmembers. The relevant statute authorized the exaction only

of the employee's "'proportionate share of the cost of the collective bargaining process and contract administration.'" *Id.* at 295 n.1, quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983). Consequently, the collective bargaining agreement authorized the employer to seize only a fee equal to the employee's *pro rata* share of the union's expenditures for collective bargaining, contract administration, and grievance adjustment. 475 U.S. at 295-96.

III. THE FULL REFUND ORDERED UPON ENTRY OF THE PRELIMINARY INJUNCTION IS NOT FINAL AND WAS NOT FOR THE ENTIRE CLASS; *ALLEN*'S LIMITS ON AN APPROPRIATE REMEDY ARE NOT APPLICABLE IN THIS CONTEXT.

District 925 and the court of appeals, Pet., App. A at 20a, rely upon *Street*, 367 U.S. at 775, and *Allen*, 373 U.S. at 122-24, to conclude that full restitution of fees seized prior to *Hudson* compliance is "unwarranted." Opp. at 16-17. Those decisions are not controlling because they are inapposite.[5] Both cases only establish the appropriate remedy for an excessive **collection** of an objectors' fees. *See Street*, 367 U.S. at 775 (a refund of nonchargeable expenditures); *Allen* 373 U.S. at 122-24. Neither addresses the appropriate remedy for failure to comply with "the constitutional requirements for the Union's collection of agency fees." 475 U.S. at 310. *Hudson* is clear and unambiguous on this point; unions must comply with the "constitutional require-

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[5] District 925 also misrepresents the Record by stating that its new notices and procedures "satisf[y] Arbitrator Florman's requirements and the District Court's subsequent May 31, 1991 decision," and that its "procedures now comply with *Hudson*." Opp. at 6, 16; *see also id.* at 2 ("procedures now in use have not been challenged" by Petitioners). Petitioners remain protected against "fair share fee" seizures by an injunction entered on remand from the Sixth Circuit's reversal of the denial of their Motion for a Preliminary Injunction, Pet., App. E at 47a; *see also* R. 61, which, as of the date of the filing of this Brief, Respondents have not moved to dissolve. No court has adjudicated the adequacy or validity of any of District 925's notices or procedures promulgated after the 31 May 1991 decision.

ments" **before** they collect **any** fees, as the court of appeals itself conceded. Pet., App. A at 20a.

Only a full refund of all fees will insure that unions comply with the minimum constitutional standards for notice and procedures established in *Hudson*; only this remedy will "avoid a recurrence of the violation." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *see also Elvin v. Oregon Public Employees Union*, 832 P.2d 36, 42 (Or. 1992), (full restitution is not punitive in this context). If full refunds are not required, unions self-evidently have affirmative economic incentives to ignore the "constitutional requirements" and to keep the nonmembers "in the dark" about their rights. *See Hudson*, 475 U.S. at 306, 310.

Finally, the assertions that the relief sought by Petitioners "could have crippled District 925's ability to represent all members of the bargaining unit," that some "non-union 'free riders' ... hoped to benefit from some aspects of union representation," and that the "financial destruction of the union" would have resulted from the Plaintiffs' success in obtaining all of the relief sought, Opp. at 10, are nothing more than alarmist, speculative cant, unsupported by **any** record evidence.[6] A full refund would merely put the union into the position it was in prior to the enforcement of its illegal fee seizure scheme.[7]

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[6] Even assuming that there were record evidence supporting these apocalyptic conjectures, we are aware of no case which stands for the proposition that a tortfeasor is relieved from compensating its victims because it would suffer as a result of an appropriate award to them.

[7] Likewise, the assertion that full restitution "would undeniably deny the union that 'fair share'" or "unduly penalize the union," Opp. at 17, is singularly self-serving under the facts of this case. *Inter alia*, the union made extraordinary efforts to burden the nonmembers' exercise of their First-Amendment rights by imposing a requirement that **three** certified mailings be made to fully navigate its original procedures and through other violations of *Hudson* found by the district court. R. 1, Ex. B; App. E at 60a.

IV. EVEN IF ONLY THE NONCHARGEABLE PORTION OF THE FEE MUST BE REFUNDED, FEDERAL COURTS MUST ADJUDICATE AND AWARD DAMAGES FOR CONSTITUTIONAL TORTS.

Rather than addressing the district court's failure to fulfill its Article III duties, District 925 recasts this issue, stating that Petitioners were required to controvert the "arbitrator's findings as to the propriety of the fee with *facts*." Opp. at 19 (emphasis in original). But, the propriety of the district court's rubber-stamping of the "arbitrator's" decision is simply **not** a question of summary judgment practice, as District 925 suggests. *Id.* at 18-20.[8] The union's argument fails for three reasons.

First, nonmembers are **never** required to prove a union's chargeability claim wrong; the union must prove that the amount of its claim for fees is valid. *See, e.g., Hudson*, 475 U.S. at 306 & n.16. Here, if District 925 is correct, the district court impermissibly shifted the burden of proof to the nonmembers.

Second, District 925 distorts *Hudson* by selective quotation. While "expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker," *id.* at 308 n.21, *Hudson* does not validate the lower court's treatment of that decision (even if it had been true arbitration) by reason of that observation. To the contrary, this Court specifically held that "[t]he arbitrator's decision **would not** receive preclusive effect in any subsequent § 1983 action." *Id.* (emphasis added), citing *McDonald v. City of West Branch*, 466 U.S. 284

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[8] District 925 continuously misrepresents its intra-union proceeding "under procedures administered by the American Arbitration Association" as an "arbitration," and the decisionmaker as an "arbitrator." Opp. at 3. Petitioners neither consented to nor participated in that proceeding. Pet. at 27 n.24. District 925 devalues simple words and misrepresents the nature of that proceeding by continuing to refer to it as "arbitration." *See AT&T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration").

(1984). Chargeability is a **legal** question in the first instance, *Lehnert*, 111 S. Ct. at 1959; *Ellis*, 466 U.S. at 447-48, *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992), and Petitioners clearly raised these **legal** issues in response to the union's submission of the phony "arbitrator's" decision as part of its summary judgment motion. R. 40 at 23-25.[9]

Finally, even by its own standards, Pet., App. C at 40a, the district court must be reversed. It was temporally impossible for the "arbitrator" to apply the appropriate standard for chargeability because her decision—and the district court's rubberstamping of it—occurred before this Court's decision in *Lehnert*.

By ignoring the question presented by the Petition, District 925 *ipso facto* concedes that the district court abdicated its duty to provide the Petitioners with "federal adjudication" of their claim for damages, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 850 (1986), and ignored its obligation to award at least nominal damages for the violations of the Petitioners' "right to procedural due process," *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992), which it did find. The district court violated these principles by flatly refusing to adjudicate Petitioners' damages, and treating non-judicial determination as though it were a judgment binding upon the Petitioners.[10]

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[9] The union's representation that "Plaintiffs never contested with facts the arbitrator's determination that the 90% fair share fee had been properly calculated by the union," Opp. at 19, consciously misrepresents the Record. Petitioners repeatedly showed that the standards to determine chargeability applied by the union are constitutionally overbroad and that the "arbitrator's" legal findings on chargeability are *per se* erroneous. *See* R. 1, ¶¶ 39, 41, 42; R. 32 at 18-24; R. 40 at 12-16, 23-25.

[10] District 925 quotes the district court's conclusion that "The arbitrator correctly determined that the chargeability determination made by District 925 is valid." Pet., App. C at 43a. However, the union fails to mention that the district court based its conclusion solely on the finding that "the arbitrator thoroughly examined the extensive financial documentation buttressing the

(continued...)

This result transforms *Hudson*'s requirement that unions **provide** "a reasonably prompt **opportunity** to challenge the amount of the fee before an impartial decisionmaker," 475 U.S. at 310 (emphasis added), into a practical obligation that **the nonmember** seek and **exhaust** relief before that "impartial decisionmaker," contrary to *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501 (1982). This nakedly denies Petitioners their right to instead seek relief in the federal courts under 42 U.S.C. § 1983. It permits unions to "adjudicate" constitutional issues before nonconsensual "arbitrators" without the nonmembers' participation or actual challenge even where, as here, the nonmembers affirmatively sought relief in the federal courts. This grossly deviates from *Hudson*'s protections, which by their own terms are designed to insure and facilitate the protection of nonmembers' constitutional rights, and violates Petitioners' "personal right ... to demand Article III adjudication of [their] civil suit." *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537 (9th Cir.) (*en banc*, opinion by Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984).

CONCLUSION

The Petition should be granted as to all questions presented.

Respectfully submitted,

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[10](...continued)
calculations." *Id.* at 40a. The Record shows that only portions of the "arbitration" record were before the district court, and that the district court could not and did not examine the complete "arbitration" record to support its rubber-stamping of the "arbitrator's" decision. R. 34.